A TREATISE OF THE LAW OF PARTNERSHIP.

BY WILLIAM WATSON,
OF LINCOLN'S-INN, ESQ.

Societas jus quoddam fraternitatis in se habet.

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MVSEVM
BRITAN
NICVM

TO THE

RIGHT HONORABLE

ALEXANDER Lord LOUGHBOROUGH,

LORD HIGH CHANCELLOR OF GREAT-BRITAIN,

THIS WORK IS

(BY HIS LORDSHIP's PERMISSION)

HUMBLY DEDICATED,

WITH A PROFOUND RESPECT FOR

THE TALENTS, ERUDITION, AND JUDGMENT,

HAPPILY BLENDED WITH

THE MANNERS OF A GENTLEMAN,

WHICH HAVE RENDERED HIS LORDSHIP

SO DISTINGUISHED AN ORNAMENT

OF THE BRITISH NATION.

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INTRODUCTION.

DURING the progreſs and advancement of Commerce in *Great Britain*, Partnerſhip engagements have been found highly uſeful to the cultivation and extenſion of particular concerns, and very conducive to the mutual benefit of perſons, whoſe ſeparate capitals, or individual labor and induſtry, would have been too limited for many objects eaſily attainable by their united operation. It ſeems therefore natural and proper to apply ſome attention, in theſe introductory remarks, to the ſubject of Commerce in general, with a view to trace out the ſources from whence the advantages of trading in a joint ſtock proceed; before entering upon the conſideration of the law by which Partnerſhip is regulated and governed.

It is difficult to fix the preciſe time when commercial dealings by the intervention of money firſt began in the world; or to trace with much accuracy the ſeveral ſtages of commercial credit to its preſent height in this country.

The exchange of goods preceded the commencement of merchandize by the uſe of any common meaſure of value. The firſt moveable property uſed for ſuch common meaſure, to eſtimate and aſcertain the price of other things, ſeems to have conſiſted in cattle; hence the wealth of perſons was deſcribed by the ſize of their herds and flocks. Thus alſo in *Homer* (a) the armour of *Glaucus* and *Diomede* are valued, one at an hundred oxen, and the other at nine. Whether we underſtand his meaning literally, or only as a mode of deſcribing the value by a compariſon of price, the alluſion comes to the ſame point; and with the like alluſion money, and indeed every ſpecies of eſtate and property was among the *Romans* named *Pecunia*, from *Pecus*.

The uſe of metals, as the moſt convenient ſtandard of common value, or price to be paid upon the transfer of property, is of very ancient date. We trace it back in ſacred hiſtory to the days of the patriarch *Abraham*: In profane hiſtory we find it under *Midas*, and alſo under *Janus* who was the moſt ancient (b) of the gods in *Italy*.

And according to *Heathen* Mythology *Mercury* was the God of Merchandize.

(a) *Il.* b. 6. l. 236. ἑκατόμβοϊ ἐπιβοίων.
(b) *Juv.* 6. 393.

Thus

Thus *Julius Cæsar* informs us that the ancient *Gauls* attributed the invention of commerce to him. He is said to have his name *a mercibus; est enim mercatorum Deus, præestque Lucro* (c).

In this country merchandize and commerce have been largely and liberally protected; And although, the ancient municipal laws of the realm seem to have been formed without any view to the present existing state of our extended commerce; yet many positive institutions have been introduced, and at different periods ingrafted into our laws for the benefit of trade both foreign and domestic. These institutions have been gradually combined with those of other countries and matured into a system, called the LAW MERCHANT, which is a code of usages and customs founded on the basis of mutual justice, and universally adhered to by the *British* merchant.

The law merchant is noticed and recognized both in our own common and statute law (d); and in many instances has its own peculiar effect in questions between Merchants, much of its advantage resulting from the universality of its adoption. Indeed,

(c) *Ainsworth*, in verb. *Mercurius*. (d) 13 *Ed.* 4. c. 9.

chiefly

chiefly the *Britiſh* merchant, but with him, and for his benefit, *alien* merchants, belonging to countries in friendſhip with our own, may be conſidered as the particular favourites of the *Britiſh* Law, from times of high antiquity down to the preſent (e). And it is now univerſally agreed that commerce, advanced as it is, to a degree of height not aimed at by any of the traders of antiquity, is a ſubject worthy to employ the attention of philoſophers, ſtateſmen, and lawyers, as well as the induſtry and enterprize of merchants.

It is true, that prior to the reign of *Henry* VIII. the commerce of *England* was at a low ebb. In his time it greatly increaſed; but our anceſtors remained comparatively ignorant of commercial affairs till they began to aſſume a degree of form and regularity, about the middle of the reign of Queen *Elizbeth* (f), whoſe protection and encouragement animated her ſubjects, to the formation of different trading companies, and the eſtabliſhment of divers manufactories in her capital. At this period the genius of trade began to ſpread, and the true uſe of PARTNERSHIP was dicovered; ſince which time, our

(e) Laws of *K. Alfred*, *Mirrour*, c. 1. ſec. 3. *Intr. Leg. Ethel.* c. 2. *Mag. Char.* c. 32, *Inſt.* 37. *Molloy*, 348.

(f) Stiled the Commercial Reign, *Jones's* Law of Bailments p. 103.

commerce, whilſt continually enriching this country, hath contributed to make us free, and that freedom, which is the boaſt and glory of *Engliſhmen*, hath in its turn greatly extended our commerce.

It would be going far beyond the limits here propoſed, to enter upon the diſcuſſion of any branch of the complicated and important queſtion, how far Chartered Companies are uſeful or injurious to commerce. It is ſufficient, that private voluntary partnerſhips in trade, are generally thought beneficial to commerce, by the merchants of *England*. Great benefits ariſe to the traffic of this country from its commodious ſituation for trade and commerce with all mankind, and from other local ſuperiorities; but the beſt advantages could not always be made of theſe without *Fellowſhip*, and *Partnerſhip Concerns*, which increaſe the merchant's credit, give energy to every undertaking, and afford additional counſel; whereby the *Britiſh* merchants have rendered their profeſſion, not only in a high degree beneficial to the State, but moſt honorable and profitable to themſelves.

Under ſuch circumſtances it appears ſomewhat ſingular that this branch of mercantile and legal ſcience ſhould never have been treated

treated by any *Engliſh* writer in a ſyſtematic form, and that even the rules of authority and practice ſhould remain ſcattered in the works of general writers, and reporters, without any attempt having been made to collect them prior to this Eſſay, at the concluſion of the eighteenth century.

It is indeed the obſervation of a popular writer(g), that "Nothing upon the ſubject of "Partnerſhip requires explanation, but in "what manner the profits are to be divided, "where one partner contributes money, and "the other labor; which is a common "caſe."

Nevertheleſs in many recent inſtances queſtions of no inconſiderable importance have been decided both in the Courts of Law and Equity relating to various other topics ariſing out of partnerſhips in trade, beſides thoſe which are confined to the adjuſting of conteſted rights and claims between partners themſelves. And ſhould the Author's humble endeavour to arrange them in their natural order prove uſeful in the ſmalleſt degree, his labors will be abundantly rewarded.

(g) *Paley*'s Moral and Political Philoſophy, 1 vol. p. 176.

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A TREA-

A

TREATISE

OF

The Law of Partnerships.

CHAPTER I.

Partnership—WHAT.

PARTNERSHIP is a voluntary contract, between two or more perſons for joining together their money, goods, or labor, upon an agreement that the gain or loſs ſhall be divided proportionably. And in ſuch partnerſhip-property each member hath one and the ſame ſpecies of intereſt; their title being undivided, whether each individual partner contributes exactly in the ſame proportion or not; but their ſe-

veral degrees of intereſt muſt be regulated according to the agreed proportions, and the other conditions of partnerſhip. The partners are themſelves joint-tenants in all the ſtock and partnerſhip effects; and they are ſo not only of the particular ſtock in being at the time of entering into the partnerſhip, but they continue joint-tenants throughout, whatever changes may take place in the courſe of trade; for if it were otherwiſe, it would be impoſſible to carry on partnerſhip trade. Thus it was held in the caſe of *Skipp* v. *Harwood*[a]; where a partnerſhip was entered into in a brewery between *Skipp* and *Ralph* and *James Harwood*, and particular terms were then agreed on between them, that *Skipp* ſhould have a certain proportion of the out-ſtanding debts, and a lien and ſecurity on the partnerſhip-ſtock to make that ſhare of thoſe debts good to him according to the value ſet on them, with a penalty in caſe of a breach. And we find the very ſame doctrine held by Lord *Mansfield* in the caſe of *Fox* v. *Hanbury*[b], only carried to a higher pitch; for it is in this caſe determined that

[a] 1 Vez. 242. reported under the title of *Weſt* v. *Skipp*, but cited by Lord *Mansfield* in *Fox* v. *Hanbury* as above.

[b] Cowper 449.

the

the aſſignees under a commiſſion of bankrupt againſt one partner, can only be tenants in common of an undivided ſhare, ſubject to all the rights of the other partner. And here his Lordſhip cited the words of Lord *Hardwicke*, "If a creditor of one partner "takes out execution againſt the partnerſhip "effects, he can only have the undivided "ſhare of his debtor; and muſt take it in the "ſame manner the debtor himſelf had it, "and ſubject to the rights of the other part-"ner." So that one partner can have no right againſt the other, in his capacity of partner, but to what is due from him out of the joint-jock, after making all juſt allowances, let the fluctuations of trade be what they may. The whole of this doctrine ſeems to ariſe out of the very principle upon which partnerſhip is founded, namely, probable profit, and the riſk of loſs; the advantages, or diſadvantages, of which cannot, in common juſtice, be confined to one ſide only, but muſt be reciprocal throughout [c].

The different civil law writers have, in ſome degree, varied in their mode of conſidering

[c] 12 Mod. 446.

partnerſhips, with relation to the nature of the contract itſelf. *Grotius* conſiders partnerſhip to be a *mixt* contract.—And *Barbeyrac* in his Notes on *Puffendorff*[d] obſerves that a partnerſhip is contracted ſometimes tacitly; when, for example, a thing being bought in common, is not parted, but the intereſted parties without explaining themſelves further enjoy it equally, each taking the profit that ariſes, and contributing his own proportional part in the neceſſary expences for it's maintenance: *ſocietatem coire, et re, et verbis, et per nuncium poſſe nos, dubium non eſt*[e].

But *Puffendorff*[f] obſerves that in partnerſhip, tho' one contributes money and work, another only money, yet it does not ſeem to be a *mixt* contract. For a contract does not become mixt from the different performances, but from our agreements in matters of a different nature by one and the ſame covenant.

Partnerſhip being a voluntary contract where the conſent of the parties engaging therein is neceſſary for its formation, thoſe

[d] B. 5. c. 8.
[e] Dig. lib. 17. tit. 2.
[f] Lib. 5. c. 2. ſ. 10.

perſons

perſons who hold any thing in common, independently of their own free will, cannot be deemed partners; and of this latter claſs are donees and the *legatees* of one and the ſame thing, or thoſe who thro' other cauſes chance to hold ſomething between them which is not divided, or is to be poſſeſſed in common without any mutual agreement. It is not enough to form a partnerſhip, that two or more perſons hold any thing in common among them, ſuch as the *legatees*, *donees*, or *purchaſers* of one and the ſame thing. For ſuch ways of having ſomething in common among many, not implying the reciprocal choice of the parties, cannot link them together in partnerſhip. All the parties contracting ought reciprocally to chuſe and approve of one another in order to form among themſelves that ſort of tie, which is a kind of brotherhood; *Societas jus quodamodo fraternitatis in ſe habet* g. And it ſeems to have been an eſtabliſhed and invariable rule that no partnerſhip ſhall be contracted except it be of trade or commerce, or other thing that is honeſt and lawful; and all partnerſhips contrary to ſuch rule would be unjuſt. As for inſtance, it would be contrary to equity and honeſty,

g Dig. l. 63. ff. pro. ſoc.

conſequently unjuſt, if it ſhould be agreed, that the whole loſs ſhould fall upon one of the partners without his having any ſhare of the profits, and that the whole profits ſhould go to another partner, without his bearing any ſhare of the loſs [h]. *Si maleficii ſocietas coita ſit, conſtat nullam eſſe ſocietatem generaliter enim traditur rerum inhoneſtarum nullam eſſe ſocietatem* [i]. *Societas flagitioſæ rei nullas vires habet. Delictorum turpis atque fœda communio eſt* [k].

Such, then, being the nature of partnerſhip contracts formed by mutual conſent, for the reciprocal advantages which may probably ariſe from the joint ſtock put into partnerſhip, there can be no doubt but, in a moral view, probity and fair dealing ought to have, in ſuch a contract, an extent proportioned to that of the engagements entered into. *In Societatis contractibus fides exuberet* [l].

The very *word* Partner ſeems to import the ſubſtance of the thing; the name is derived

[h] L. 57. ff. pro. ſoc. & ſtat.

[i] L. 35. ſ. 2. ff. de contr. empt.

[k] L. 53. ff. pro. ſoc.

[l] Inſt. b. 3. pro. ſoc.

from

from *Pars*, a portion, or that which in diviſion falls to each; and the properties of a partnerſhip are derived from its unity, which is four-fold; the unity of intereſt, the unity of title, the unity of time, and the unity of poſſeſſion: or, in other words, partners have one and the ſame intereſt accruing by one and the ſame conveyance, commencing at one and the ſame time, and held by one and the ſame undivided poſſeſſion.

In partnerſhip concerns there muſt be one and the ſame intereſt throughout, whether each individual partner contributes equally or not; if all parties contribute equally, each muſt receive or bear an equal ſhare in the *gain* or *loſs*; and where the partners contribute unequally it will only be neceſſary to have recourſe to the laws of arithmetical proportion to adjuſt their reſpective ſhares.

This rule will equally apply, whether two or more partners join *labor*, or one finds *labor* and the other *money*; or each of them contributes both labor and money [m].

In partnerſhip concerns the ſeveral partners may be ſaid to have an unity of *title*,

m Puff. Law. p. 513.

becauſe their intereſt in the ſtock and effects muſt be created by, or ariſe under, one and the ſame agreement. There muſt alſo be an unity of *time*, becauſe the intereſt of each partner in the partnerſhip property is created at one and the ſame period [n]. And, ſince it has been decided that partners are ſeiſed *per my et per tout*, both in antient and modern times, it follows that there muſt be an unity of *poſſeſſion*, each partner being poſſeſſed by a moiety, and by all [o]; that is they each of them have the entire poſſeſſion, as well of every part as of the whole; each having an undivided moiety of the whole, and not the whole of an undivided moiety. Like the jointenants of a real eſtate, *Quilibet totum tenet et nihil tenet; ſcilicet, totum in communi, et nihil ſeparatim per ſe* [p].

Upon this principle Lord *Mansfield* ſeems to have determined that, if two are *partners* as *attornies* and *conveyancers*, and *one* of them receives money to be laid out on mortgage, the *other* is *liable* for the amount, though his partner ſhould even have given a *ſepa-*

n It is laid down as a general rule that joint eſtates muſt veſt at once. Co. Lit. 188. a.

o Smith v. De Sylva, Cowp. 471.

p Bracton c. 5. Tr. 5. c. 26.

rate

rate receipt for it. Thus it was decided in the caſe of *Willet* v. *Chambers* [q].

This was an action for money had and received to the plaintiff's uſe, brought againſt the defendant as *ſurviving partner* of one *Dadley*. Plea, *non aſſumpſit*. Verdict for the plaintiff, damages 480 *l*.

Upon a rule to ſhew cauſe why a new trial ſhould not be granted, the facts appeared to be as follows:

That *prior* to any partnerſhip between the defendant and *Dadley*, who was an *attorney* and *conveyancer* at *Coventry*, the *latter*, in the year 1771, received of a Mr. *Bindley*, the ſum of 350 *l*. to be laid out on a real ſecurity: *Dadley* accordingly furniſhed him with a *mortgage* from a Mr. *Hughes* to that amount; which, as it afterwards appeared, *Dadley* had *forged*. At *Midſummer* 1776 *Dadley* and *Chambers* entered into partnerſhip: ſhortly after which *Bindley* wanted to call in his money. The pretended mortgagor was ſuppoſed at the ſame time to want a further ſum of 150*l*. which added to the original mortgage money, made together

[q] Cowp. 814.

the

the ſum of 500 *l.* The plaintiff *Willet* was ready to advance this ſum: and in conſideration of his doing ſo, an aſſignment was made to him of the *pretended* mortgage before made to *Bindley*. As to 180 *l.* *part* of this ſum of 500 *l.* *Willet* paid it into *Dadley*'s office, to *Chambers*, who gave the following receipt for it: "Received of Mr. *Benjamin Willet*, the ſum of 180 *l.* for which I promiſe *to account to him on demand — Chambers.*" *Dadley* was not at home when this ſum was paid. Some time after the plaintiff called at the office to pay 300 *l.* more, part of the remaining 320 *l.* due. *Dadley* being then at home, *Willet* paid the money to *him*; and, in return, *Dadley* gave him the following receipt: "Received on account, of Mr. *Benjamin Willet*, 300 *l.* the remainder of the money to be paid, being 20 *l.* *Dadley.*" It was admitted that the defendant *Chambers* was in no reſpect privy to the forgery; and that no *procuration-money* was paid, either to *Chambers* or *Dadley*.

Serjeant *Hill* and Mr. *Green*, who ſhewed cauſe, argued, that this was not diſtinguiſhable from the common caſe of a ſurviving partner, who is always liable to partnerſhip debts.

Mr. *Wallace*,

Mr. *Wallace*, Mr. *Newnham*, Mr. *Dunning*, and Mr. *Wheler*, *contrà*, in ſupport of the rule, contended, that this tranſaction was not within the compaſs of the partnerſhip, which was for the purpoſe of carrying on the buſineſs of *attornies only*; *not* that of *ſcriveners*. A money ſcrivener is a perſon who receives money for the purpoſe of deriving ſome advantage from the receipt of it. But a mere conveyancer, as ſuch, is by no means a money ſcrivener. His buſineſs is only to draw deeds and writings for the transfer of property from one man to another; and his profit ariſes from his bill of fees and charges for ſo doing. The two branches, therefore, though it may happen that they are ſometimes exerciſed by the ſame perſon, are in themſelves totally diſtinct and ſeparate. If ſo, the fact of their being united in the partnerſhip carried on between the defendant and *Dadley*, ought to have been proved; whereas the reverſe is the truth of the caſe. For it is admitted they took no procuration money, and there is no evidence of any profit from the money in their hands. On the contrary, all that *Chambers* received, was punctually *paid over* to *Bindley*: that alone therefore would be an anſwer to the preſent demand. The receipts they gave, were *ſeparate*;

ſeparate; *not*, "*for partner and ſelf*;" but "*for which I promiſe to account.*" In ſhort, the whole of the tranſaction was entirely foreign to the partnerſhip, and what each did, plainly ſhewed he conſidered the part he took in it, as his own ſeparate act and deed only. Therefore, they prayed the rule might be made abſolute.

Lord *Mansfield.* Both parties in this caſe undoubtedly are innocent; and the loſs that will fall upon the defendant, if the law is againſt him, will be much greater than that which will be ſuſtained by the plaintiff, if he fails. It is indeed ſo hard a caſe upon the defendant, that every leaning of the Court would be in his favour. But the queſtion is, "Whether, *in point of law*, this engagement with *Dadley* does not make *Chambers* anſwerable?"

To go by ſteps.—It is neceſſary to ſee what the buſineſs was, which *Dadley* carried on alone, before his connection with the defendant in the year 1776. By admiſſion of the counſel on both ſides, it was the buſineſs of any *attorney* and *conveyancer*. By proof in the cauſe, it appears to have been a *great deal more*. For he had *many appointments*,

ments, though the nature of them is not particularly mentioned. He had alſo *agencies*, and was *clerk to a navigation*. But there is no pretence that he ever received *procuration money*. The buſineſs of conveyancing, in the very nature of it, as carried on in the country, is this: Where there is an attorney or counſel of credit, they receive money to place out upon ſecurities; and perſons who want to borrow, as well as thoſe who want to lend, apply to them for that purpoſe. Their *profit* ariſes from *having the money* in their hands, before it is laid out upon the intended ſecurities; and from their fees and *bill of charges* upon the conveyances they draw. It is not diſputed but that this was the nature of *Dadley*'s conveyancing buſineſs: He did not act however as a ſcrivener, who ſometimes does not touch the money; but who in all caſes gets *procuration money*. There is no proof of any tranſaction of that kind; nor indeed is it cuſtomary for attornies, like him, to do ſo; for they get profit enough without it. I remember a caſe before me of a perſon who was truſted to the amount of many thouſand pounds, in the manner I have ſtated; and *that* is the nature of the buſineſs. This was the buſineſs of *Dadley*, *before the partnerſhip*. Let

us ſee then what was the nature of the partnerſhip, afterwards entered into, between *Dadley* and the preſent defendant; whether it was a *general partnerſhip* in all *Dadley*'s buſineſs, or *confined to one particular branch* of it only; for to be ſure, there *may be* ſuch a *confined partnerſhip*. The evidence as to this point conſiſts in the heads and terms of an agreement entered into between them, which were afterwards extended and reduced into form. From them it appears, there was no particular reſtriction; it was not to be confined to ſuits, nor to conveyancing only, but they were to be *partners in the buſineſs* which Mr. *Dadley* carried on. Each was to be worth a certain ſum. The profits are ſtated at 800 *l.* Then it is agreed that a proviſion ſhould be made for the family of which ever of them ſhould happen to die firſt. And then comes the following *clauſe*, at the end, which, though not taken notice of by the counſel on either ſide, is very material indeed upon this occaſion. My object, in examining it particularly, was to ſee whether it contained any reſtriction. The clauſe is this: "*Note*, this ſcheme of partnerſhip is intended to include all Mr. *Dadley*'s preſent and future practice and appointments, ſuch as *agencies*, *navigation clerk*, &c.

&c. but *not* to extend to any *public* office or place, which may at any future time be given to either of the parties." The only reſtriction therefore is that; or, more properly ſpeaking, it is the only exception to this general partnerſhip. Thus the partnerſhip commences, without waiting for articles; and from that time, the *buſineſs* was carried on in partnerſhip. One branch of that buſineſs, was *conveyancing*. Incident to *conveyancing* is, the *receiving of money* to place out upon ſecurities. Receiving it *from the lender* to advance to the *borrower*, and acting for both parties reſpectively. From that, the profit ariſes; not from *procuration-money*, but from the money laying in their hands before it is placed out, from the charges and fees for drawing and engroſſing the conveyances. The facts then are ſhortly theſe:--- The plaintiff *Willet*, wanting to place out a ſum of 500 *l.* applies to the office without making any diſtinction between the two partners. The firſt ſum he advances is 180 *l.* This he pays to *Chambers*, who gives a general receipt for it, not expreſſing it to be for *Dadley*, or for what, or whoſe uſe; but making himſelf accountable for the amount on demand. He receives it therefore, as the *principal*, *not* as the *agent* of *Dadley*: and

it

it is admitted he knew the uſe, by placing it out upon the ſecurity for which it was put into his hands. The next ſum, which is 300 *l.* is paid by the plaintiff to *Dadley*, who receives it exactly in the ſame manner as *Chambers* did the former ſum; as *principal*; and gives a receipt for it, not as for ſo much money to be placed out, but as a ſum for which he was to be accountable. The two ſums together, come within 20 *l.* of what was wanted upon the ſecurity. Afterwards the bill for conveyancing is brought in. *Hughes* being the original mortgagor, if he had not been a fictitious perſon, and had wanted a further ſum of money upon the aſſignment, *he* ſhould have paid the expence of conveyancing. But the bill is brought in, to the plaintiff, and made out "debtor to *Chambers* and *Dadley*." *Chambers* receives the money, and gives a receipt for it. In that tranſaction therefore, he is clearly conſidered *as a partner*, and the tranſaction itſelf as a *partnerſhip tranſaction*. If *Dadley* had received procuration-money, and that kind of dealing had been excepted out of the articles; or, if ſeparate accounts had been kept of the money got by theſe tranſactions, and it had all been ſet down to the profits of *Dadley* only, it might have varied the

the caſe: and Mr. Juſtice *Aſhburſt*, who tried the cauſe, would have been very glad to have given a direction in favour of the defendant. He ſuffers by the raſcality of a man who had a very good character. I am very ſorry for the defendant; but upon this evidence I cannot ſay, but that it is a *partnerſhip tranſaction*.

Mr. *Newnham* informed the Court, that the bill included other buſineſs, as well as the particular tranſaction of the mortgage.

Lord *Mansfield* ſaid, *that* proves nothing, but that in general they were partners in the fees of conveyancing.

Per Curiam. Rule for a new trial diſcharged.

Every man who has a ſhare of the profits of a trade, ought alſo to bear his ſhare of the loſs. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment.

So alſo a man who advances money to a trader, and becomes intereſted thereby in the

profits of the trade, oftentimes makes himſelf a ſecret partner, though it does not in all caſes conclude him ſo. And Mr. Juſtice *Blackſtone* ſays, that the true criterion (when money is advanced to a trader) is to conſider whether the profit or premium is certain and defined, or caſual, indefinite, and depending on the accidents of trade. In the former caſe it is a *loan*, in the latter a *partnerſhip*.

This diſtinction we find made in the caſe of *Grace* v. *Smith*[r], *Eaſter* term 15 G. 3. C. P. Here was an *aſſumpſit* for goods ſold and delivered; and upon the trial, a verdict was found for the defendant. *Davy* moved for a new trial; the verdict, as he ſaid, being contrary to law and evidence.

De Grey Chief Juſtice reported that this was an action brought againſt *Smith*[s], alone as a ſecret partner with one *Robinſon*, to whom the goods were delivered, and who became bankrupt in 1770. That on the 30th of *March* 1767, *Smith* and *Robinſon* entered into partnerſhip for ſeven years, but in *No-*

[r] Grace againſt Smith, Black. 998.

[s] See Abbott v. Smith, 2 Black. 947.

vember

vember afterwards ſome diſputes ariſing, they agreed to diſſolve the partnerſhip. The articles were not cancelled; but the diſſolution was open and notorious, and was notified to the public on the 17th of *November* 1767. The terms of the diſſolution were, that all the ſtock in trade and debts due to the partnerſhip ſhould be carried to the account of *Robinſon* only. That *Smith* was to have back 4200 *l.* which he brought into the trade, and 1000 *l.* for the profits then accrued, ſince the commencement of the partnerſhip: That *Smith* was to lend *Robinſon* 4000 *l.* part of this 5200 *l.* or let it remain in his hands for ſeven years, at five *per cent.* intereſt, and an annuity of 300 *l.* *per annum* for the ſame ſeven years. For all which *Robinſon* gave a bond to *Smith*. In *June* 1768, *Robinſon* advanced to *Smith* 600 *l.* for two years payment of the annuity and other ſums by way of intereſt, and gratuities, and other large ſums at different times to enable him to pay the partnerſhip debts, *Smith* having agreed to receive all that was due to the partnerſhip, and to pay it's debts, but at the hazard of *Robinſon*. That on the 1ſt of *Auguſt* 1768, the demands of *Smith* were all liquidated and conſolidated into one, *viz.* 5200 *l.* due to him on the diſſolution of the partnerſhip;

1500 *l.* for the remaining five years of the annuity, and 300 *l.* for *Smith*'s ſhare of a ſhip: in all 7000 *l.* for which *Robinſon* gave a bond to *Smith*. That on the 22d of *Auguſt* 1769 an aſſignment was made of all *Robinſon*'s effects to ſecure the balance then due to *Smith*, which was ſtated to be 10,000 *l.* Soon after the commiſſion was awarded.

Davy for the plaintiff inſiſted, that the agreement between *Robinſon* and *Smith* was either a ſecret continuance of the old partnerſhip, or a ſecret commencement of a new one; being for the retiring partner to leave his money in the viſible partner's hands, in order to carry on his trade; and to receive for it twelve and a half *per cent.* profit, which could not be fairly done, unleſs it be underſtood to ariſe from the profits of the trade: and that he ought therefore to be conſidered as a ſecret partner. And he relied much on a caſe of *Bloxham* and *Fourdrinier* againſt *Pell* and *Brooke*, tried at the ſame Sittings (7th of *March* 1775) before Lord *Mansfield* in the *King's Bench*, as in point. "This was alſo a partnerſhip for ſeven years between *Brooke* and *Pell*; but at the end of one year agreed to be diſſolved, but no expreſs diſſolution

lution was had. The agreement recited, that *Brooke* being deſirous to have the profits of the trade to himſelf, and *Pell* being deſirous to relinquiſh his right to the trade and profits, it was agreed, that *Brooke* ſhould give *Pell* a bond for 2485 *l.* which *Pell* had brought into the trade, with intereſt at five *per cent.* which was accordingly done. And it was further agreed, that *Brooke* ſhould pay to *Pell* 200 *l.* *per annum* for ſix years, if *Brooke* ſo long lived, as in lieu of the profits of the trade; and *Brooke* covenants, that *Pell* ſhould have free liberty to inſpect his books. *Brooke* became a bankrupt before any thing was paid to *Pell.* And this action being brought for a debt incurred by *Brooke*, in the courſe of trade, Lord *Mansfield* held that *Pell* was a ſecret partner. This was a device to make more than legal intereſt of money, and if it was not a partnerſhip it was a crime. And it ſhall not be in the defendant *Pell*'s mouth to ſay, "It is uſury, and not a partnerſhip."

Groſe and *Adair* for the defendant argued, that the preſent caſe is very diſtinguiſhable from that of *Bloxham* and *Pell.* *Pell* was to be paid out of the profits of the trade, as appears from the covenant to inſpect the books, which elſe would be uſeleſs. His

annuity was expreſsly given, as and in lieu of thoſe profits. It was contingent in another view, as it depended on the life of *Brooke*, by whom thoſe profits were to be made. In our caſe the annuity is certain, not caſual; it does not depend on carrying on the trade, nor to ceaſe when that is left off, but is due out of the eſtate of *Robinſon*.

It is not a neceſſary dilemma, that it muſt be either uſury or partnerſhip. It may be, and probably was, a premium for the good-will of the trade. Two thouſand guineas is no uncommon price for turning over the profits of a trade ſo beneficial, that it appears to have been rated at 1000*l.* to each partner in the ſpace of leſs than eight months. And whether that ſum is agreed to be paid at once, or by ſeveral inſtalments, it is the ſame thing. Beſides, whether there be or be not a ſecret conſtructive partnerſhip, is a queſtion proper for a jury, who have here decided it on conſideration of all the circumſtances.

De Grey Chief Juſtice—The only queſtion is, What conſtitutes a ſecret partnerſhip? Every man who has a ſhare of the profits of a trade, ought alſo to bear his ſhare of the loſs.

loſs. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment. If any one advances or lends money to a trader, it is not lent on his general perſonal ſecurity. It is no ſpecific lien upon the profits of the trade, and yet the lender is generally intereſted in thoſe profits; he relies on them for re-payment. And there is no difference whether that money be lent *de novo*, or *left behind* in trade by one of the partners who retires. And, whether the terms of that loan be kind or harſh, makes alſo no manner of difference. I think the true criterion is, to enquire whether *Smith* agreed to ſhare the profits of the trade with *Robinſon*, or whether he only relied on thoſe profits, as a fund of payment: A diſtinction not more nice than uſually occurs in queſtions of trade or uſury. The jury have ſaid this is not payable out of the profits; and I think there is no foundation for granting a new trial.

Gould Juſtice—Same opinion.

Blackſtone Juſtice, ſame opinion. I think the true criterion (when money is advanced to a trader) is to conſider whether the profit or premium is certain and defined, or caſual,

indefinite and depending on the accidents of trade. In the former case it is a *loan* (whether usurious or not, is not material to the present question) in the latter a *partnership*. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in trade, to any amount.

Nares Justice—Same opinion.

Rule discharged.

CHAPTER II.

Partnership,

HOW CONSTITUTED.

HAVING, in the foregoing chapter, endeavoured to point out the nature of partnership, and also the manner in which partnership property is possessed; I shall next proceed to inquire how a partnership is constituted, or what will make a person subject as a partner.

Partnership is constituted by *agreement*, which is either *expressed* or *implied*, but, which must be voluntary between the parties, and ought to be without fraud or deceit. The word agreement, is derived from the Latin, *aggregatio mentium*, which seems to express the joining together of two or more minds in any thing done, or to be done.

The Court of Chancery in carrying *agreements* into execution, govern themselves by a moral, not a mathematical certainty [a].

[a] 2 Atk. 20.

So,

So, that if two or more merchants join together in general trade, or for the performance of any particular branch of buſineſs with mutual intereſts in the profit and loſs, they are to be conſidered partners, being ſubject as joint-traders. And although a Court of Equity will not in general *entertain* a bill for a ſpecific performance of contracts for *chattels*, or which relate to *merchandize*, but leave it to *law* [b]; yet in caſes of partnerſhip, notwithſtanding it is in relation to a *chattel* intereſt, a ſpecific performance ought to be decreed.

Thus in the caſe of *Buxton* v. *Liſton and Cooper* [c], where the defendants entered into an *agreement* for the purchaſe of ſeveral timber trees, marked and growing at the time it was reduced into writing; and, on the firſt of *November* 1774, the following memorandum was ſigned by the parties.

"*Matthew Liſter* and *John Cooper* have "agreed with *Joſeph Buxton* for the pur-

[b] Sir *Joſeph Jekyll* did, in *Cud* v. *Rutter*, 1 P. W. 570. decree a ſpecific performance in the caſe of a *chattel*, but Lord *Macclesfield* reverſed it, and it has been the rule of the Court ever ſince, not to retain ſuch a bill.

[c] 3 Atk. 383, 384.

"chaſe

" chaſe of all thoſe ſeveral large parcels of " wood, conſiſting of oaks, aſhes, elms, and " aſps, which are numbered, figured, and " cyphered, ſtanding and being within the " townſhip of *Kirkby*, for the ſum of 3050*l.* " to be paid at ſix ſeveral payments, every " *Lady-day*, for the ſix following years; and " *Liſter* and *Cooper* to have eight years for " diſpoſing of the ſame; and that articles " of agreement ſhall be drawn and perfected " as ſoon as conveniently may be, with all " the uſual covenants therein to be inſerted " concerning the ſame."

Lord Chancellor *Hardwicke* ſaid," The memorandum appeared not to be the final contract, but was to be completed by ſubſequent articles. I am doubtful, ſays he, whether at law the plaintiff would not have been told this was an incomplete agreement. But, ſuppoſe two partners ſhould enter into an agreement as in the preſent caſe, to carry on a trade together, and that it ſhould be ſpecified in the memorandum, that articles ſhould be drawn purſuant to it, and before they are drawn, one of the parties flies off, I ſhall be of opinion, upon a bill brought by the other in this Court, for a ſpecific performance, that notwithſtanding it is in relation

tion to a chattel intereſt, yet a ſpecific performance ought to be decreed."

Every agreement of this ſort ought to be certain, fair and juſt in all it's parts, or this Court will not decree a ſpecific performance.

To conſtitute a regular partnerſhip there muſt be an *expreſs* agreement, or contract between the parties, capable of being determined legally by it's expreſſive form [d], for if no expreſs agreement has been made by the partners concerning their ſhares of profit and loſs; the loſs muſt be equally borne, and the profits muſt be equally divided. But, if any particular agreement has been made, it muſt be obſerved; for it was never yet doubted, but that the covenant would be binding, if two perſons ſhould agree, that two ſhares of the profit and loſs ſhould belong to one partner, and that only the third part of both ſhould belong to the other.

It is alſo a ſettled point [e], that, if partners expreſsly mention their ſhares in one reſpect

[d] Hertius's Diſcourſe de Societate, tom. 3. Commentat.

[e] Juſtin. de Societate, lib. 3. tit. 26.

only,

only, either ſolely in regard to gain, or ſolely in regard to loſs, their ſhares of that, which is omitted, ſhall be the ſame as of that which is mentioned.

In conſtituting regular partnerſhip, due attention ſhould be paid to the form and ſubſtance of the ſeveral covenants in the indentures of co-partnerſhip, becauſe upon ſuch covenants all the future convenience at leaſt, of the ſeveral partners muſt depend. But if there be no articles of co-partnerſhip between two or more perſons, who agree between themſelves to take jointly the profits, and bear equally the loſs, in any trade, ſtill, each and all of them ſhall be liable as partners, with reſpect to ſtrangers, or the world; and upon this plain principle, that ſuch ſtrangers or third perſons give credit and truſt to the general profits of the trade, and conſequently to both, or all the perſons, participating or concerned in it, as if they were partners.

In 1726 a partnerſhip was carried on between Sir *Thomas Mackworth*, General *Stewart*, *Parry*, *Hind* and *Briggs* [f], for the making

[f] Metcalf, and the Royal Exchange Aſſurance Company. Feb. 4th. Hil. Term, 1740. Barnard. 343.

and

and manufacturing of braſs and copper. In that ſame year *Parry* became a bankrupt, and Sir *Thomas Mackworth* bought his ſhare in the partnerſhip ſtock. In the ſame year Sir *Thomas Mackworth* made an aſſignment to *George Robinſon* of the fourth part of this ſtock, in conſideration of 100 *l.* But it was ſworn that *George* declared, that the intention of his taking this aſſignment was not to become a partner in this buſineſs, but only that the aſſignment ſhould ſtand as a ſecurity for ſuch ſums of money as he ſhould advance to Sir *Thomas*; and Sir *Thomas* ſwore, that the intention of this aſſignment was not, that *George* ſhould become a partner, but that he made it him merely for the purpoſe of giving him a vote at the meeting of the partners, in order that the deſigns of Sir *Thomas* in carrying on the works of this partnerſhip might be the better completed. And indeed 100 *l.* did not ſeem to be near the value of a fourth part of this partnerſhip ſtock.

In 1729 Sir *Thomas* went to *Paris*, and whilſt he was there he received a letter from *George*, giving him an account of ſome ſucceſs in this trade. Sir *Thomas* wrote him a letter in anſwer to it, giving him ſome directions in what manner he would have the works carri-

ed

ed on; and there he mentioned this expreſſion, *A profit to ourſelves*, alluding to no other perſon in the letter but to himſelf and *George*.

On the 25th of *May* 1730 an agreement was entered into by *George* with Sir *Thomas* to the following effect; "I do promiſe to be "accountable to Sir *Thomas Mackworth* in "profit and riſque, for a half in the under-"taking of carrying on certain copper works; "ſuch profit and riſque to be computed from "the 25th of *March* laſt paſt; and I do agree "to take ſuch half part of the ſtock as the "ſame has been eſtimated by the ſervants of "Sir *Thomas Mackworth*. Signed *George* "*Robinſon*." At the bottom of this paper writing there was another memorandum to this effect; "Whereas *George Robinſon* has "ſigned an agreement to the purport before "mentioned, I do hereby agree to the ſame. "Signed *Thomas Mackworth*." After this agreement was made, receipts were given, wherein the names of Sir *Thomas* and *George* were mentioned, and ſeveral ſums were advanced by *George*, in order to carry on this trade.

Afterwards in the ſame year Sir *Thomas* made a purchaſe of ſome copper of *Paz* and *Bozalio*,

Bozalio, and paid them the money for it himſelf. They ſwore, That they underſtood it, that he made this purchaſe of them on his own private account. However, the receipt that they gave him was for him and company. This copper was put into a warehouſe belonging to Sir *Thomas*; and *John Robinſon*, who was brother to *George*, and ſervant to Sir *Thomas*, went into *Scotland*: whilſt he was there *George* got the key of the warehouſe from *John*, and pledged this copper to the *Royal Exchange Aſſurance Company* for two thouſand odd hundred pounds. The money due upon this pledge not being paid at the time agreed upon, the pledge was ſold, and there remained in the hands of the *Royal Exchange Aſſurance Company* five hundred forty-five pounds, beſides what ſatisfied their debt and charges.

About the year —— 800*l.* South-Sea Annuities was bequeathed to *George* and *Ingram*, in truſt for *Ann Stretfield*, for life, the remainder in truſt for Sir *Thomas*. *Ann Stretfield* died.

In 1731 *George* became a bankrupt, and under that commiſſion the aſſignees took the poſſeſſion

poſſeſſion of the copper-works before mentioned.

In 1732 Sir *Thomas* applied to the Court by petition, ſetting forth, "That for eight "years before he had been ſolely poſſeſſed of "thoſe copper-works for his own benefit, and "that *George* had no intereſt in them." Whereupon he prayed, that the Court would relieve him concerning the ſeiſure before mentioned. Upon that petition affidavits of ſeveral witneſſes were read, both on the part of Sir *Thomas*, and likewiſe on the part of the aſſignees.

The order which was made on that petition was, that an iſſue ſhould be directed to try, whether Sir *Thomas* and *George* were partners in theſe works, or not. But that iſſue never was tried.

The preſent bill was brought by *Metcalf*, and others, the aſſignees under the commiſſion, againſt the *Royal Exchange Aſſurance Company*, againſt Sir *Thomas*, *George*, and *Ingram*, praying, that an account might be taken between the aſſignees and Sir *Thomas*, and that the 545 *l.* might be paid to the plaintiffs, or at leaſt placed to the partnerſhip ac-

count, and that the plaintiffs might be allowed to retain the benefit of the 800 *l.* *South-Sea* annuities, in caſe Sir *Thomas* ſhould appear to be indebted to them on the balance of the account. Sir *Thomas* in his anſwer to this bill ſwore, amongſt other things, that he could not ſet forth whether there was a partnerſhip between him and *George*, or not; the queſtion relating to that matter ariſing from the conſtruction of certain inſtruments in writing.

There was another bill brought by Sir *Thomas* againſt the *Royal Exchange Aſſurance Company*, and the perſons whom they ſold the copper to was made by them in an unfair manner, and praying relief upon this account.

Lord Chancellor ſaid, That there were two queſtions proper for conſideration; 1ſt, whether Sir *Thomas Mackworth* and *George Robinſon* were partners? And 2dly, ſuppoſing they were partners, what ſhare in the trade they were each of them to be conſidered to have? With regard to the firſt of theſe queſtions, his Lordſhip ſaid it was extremely plain, that they were partners. Whether they were ſo from the year 1726, is not ſo clear. But that they were ſo from the year 1731, to the time of

of the bankruptcy of *George*, is plain and manifeſt. The agreement which was entered into between them in 1731, bears date the 25th of *May* in that ſame year. The purport of the agreement is, "*I do promiſe to be ac-*
"*countable to Sir* Thomas Mackworth *in pro-*
"*fit and riſque for a half in the undertaking of*
"*and carrying on certain copper-works, ſuch*
"*profit and riſque to be computed from the* 25*th*
"*of* March *laſt paſt. And I do agree to take*
"*ſuch half part of the ſtock as the ſame has been*
"*eſtimated by the ſervants of Sir* Thomas
"Mackworth. *Signed* George Robinſon." At the bottom of this paper-writing, there was another memorandum to this effect: "*Whereas* George Robinſon *has ſigned an*
"*agreement to the purport before mentioned, I*
"*do hereby agree to the ſame. Signed* Thomas
"Mackworth."

This paper-writing purports, that Sir *Thomas* and *George* were to be partners in moieties. And after this writing was ſigned, it appears that receipts were given, wherein the names of Sir *Thomas* and *George* were mentioned; and ſeveral ſums appeared to have been advanced by *George*, in order to carry on his trade. After this writing was ſigned, *George* made a pledge of the copper in queſ-

tion to the *Royal Exchange Assurance Company* for 2700 *l.* and that transaction shews likewise that he acted in the trade as a partner. Nor does Sir *Thomas* take upon himself by his answer, to deny that he was a partner. His being a partner, or not, was a matter of fact which Sir *Thomas* could not but know. But instead of answering to the fact, he chooses to say in this manner, "That he could not set "forth, whether there was a partnership be-"tween him and *George*, or not, the question "relating to that matter arising from the "construction of certain instruments in wri-"ting." The next question is, what share in the trade they were each of them to be considered to have? And his Lordship's opinion was, they were each of them intitled to a moiety. The natural import of the agreement which was entered into in *May* 1731 shews this. It is a mutual agreement between Sir *Thomas* and *George* to become partners in moieties, and consequently it is an admission under the hand of Sir *Thomas* that he had a power to let *George* into a moiety of this trade. How the other partners went out does not appear, but it is pretty plain that there was some alteration in the interest of the partners, which occasioned this new agreement between Sir *Thomas* and *George*. After this,

this, receipts were given in both their names; if the other perſons had continued partners at this time, their names would have been made uſe of in the receipts, as well as the names of theſe perſons, or elſe the receipts would have been given generally on the behalf of one of them and company. And what makes an end of this matter is the petition of Sir *Thomas* in 1732. By that petition he expreſsly ſets forth that *George* and he were partners, and that they had been ſo for eight years together. However it has been urged that this is not ſo clear a point, but that it ought to be tried in an iſſue, eſpecially as there has been an order already made for that purpoſe. But his Lordſhip's opinion was, that there was no occaſion to direct an iſſue about it. He ſaid, upon the evidence laid before him he had no doubt concerning it. The matter now appears more plain than it did in the year 1732. That order appears to have been made merely on reading certain affidavits; but now exhibits are produced, which makes the matter more clear. The conſequence is, that upon the original bill the 545 *l.* muſt be directed to be brought into the partnerſhip account; but as to the 800 *l. South-Sea* annuities, there is no ground to allow the plaintiffs to retain any benefit of that, that being a mat-

ter in its own nature not proper for such a retainer; for which reaſon that part of the bill muſt be diſmiſſed, but without coſts. With regard to the other bill there is no foundation for that, there being no proof made, that the ſale was in an unfair manner; that bill therefore muſt be diſmiſſed with coſts. And ſo his Lordſhip was pleaſed to decree accordingly.

But, at the ſame time, in order to conſtitute a partnerſhip, and to make a perſon liable as a partner, Lord *Mansfield* held, in the caſe of *Hoare* and others againſt *Dawes* and another g, that there muſt be an agreement between him and the oſtenſible perſon to *ſhare in all riſques of profit or loſs*, or he muſt have permitted the other to uſe his credit, and to hold him out as jointly liable with himſelf.

This was an action for money lent; and after a verdict found for the plaintiff, a rule for a new trial was obtained, and the facts appeared to be as follows: That the plaintiffs, who were bankers, had advanced a ſum of money on certain tea-warrants of the *Eaſt-India* Company to *Contenier* a broker, who depoſited the tea-warrants with the plaintiffs

g Doug. 371.

as a ſecurity, and alſo gave them his note of hand for the ſum advanced. He had been employed by a number of perſons, of whom the defendants were two, to purchaſe a lot of tea at the *Eaſt-India* Company's ſale, of which they, (together with himſelf), were to have ſeparate ſhares, the lots being in general, too large for any one dealer. The practice at ſuch ſales is, for the Company to give a warrant, or warrants, to the broker or purchaſer, for the delivery of the quantity of tea purchaſed, on payment being made. At the time of the ſale, 25 *l. per cent.* is advanced, and is forfeited, unleſs the whole is paid on the *third*, which is the *laſt*, day of payment. If paid ſooner, allowance is made for prompt payment. The warrants are often pledged, and money raiſed upon them; generally conſiderably leſs than the ſuppoſed value of the tea. It happened however, in this inſtance, between the time of the depoſit of the warrants with the plaintiffs, and the time when the payment was to be made at the *India* Houſe, that the value of the tea ſunk ſo much as to be conſiderably under the amount of the ſum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were

ſince either dead, or become bankrupts. The ſhares of the defendants were to be two ſixteenths of the whole lot. The ground of the action was, that all the employers of the broker were to be conſidered as partners, and jointly and ſeverally liable for the whole. The defendants owed nothing upon their own two ſixteenths. There was not any joint concern in the re-diſpoſal of the tea. The defendant produced ſeveral bankers and brokers, (of whom *Contenier* was one) who ſaid they had had frequent tranſactions of this ſort, (it being a very uſual ſpeculation) and they always underſtood, that the only ſecurity was the pledge, and the perſonal ſecurity of the broker, unleſs where the principles were enquired after, and declared, which was very rarely done. That, as the practice was to advance conſiderably under the ſuppoſed value of the tea, and it was alſo uſual to ſtipulate, that, if the money was not re-paid within a certain time, the lender might ſell, the warrant was of itſelf a general and ſufficient ſecurity. *Contenier* ſaid that tea-warrants were conſidered as caſh, and paſſed by delivery. On the other ſide, *in anſwer to this evidence*, (the plaintiffs having, *at firſt*, reſted their caſe on the fact, that there were perſons behind the curtain, for whom the broker acted), two witneſſes

witneſſes were called. One of them, one *Cartony*, a tea-dealer, ſwore, that a broker had once borrowed ſome money *for him* on tea-warrants, from the plaintiffs, and that the value of the tea having fallen under the ſum advanced, and the broker having failed, he had paid the difference, conſidering himſelf as liable. The other was a perſon who had alſo dealt in tea, and in loans of this ſort, and he ſwore, that his idea had always been, that the perſons behind the curtain were liable; but, upon croſs-examination he ſaid, he never knew any loſs happen, nor any demand actually made, on the brokers employers.

Lord *Mansfield*.—I conſidered this, at firſt, as a caſe of dormant partners. The law with reſpect to them is not diſputed, *viz.* that they are liable when diſcovered, becauſe they would otherwiſe receive uſurious intereſt without any riſk; but, towards the end of the cauſe, the nature of the tranſaction, and of theſe loans, was more clearly explained, and I was ſatisfied with the verdict, and am now confirmed in my opinion. The evidence of *Cartony* is irrelevant, becauſe he ſaid the broker borrowed the money *for him*; and beſides he did not diſpute the demand. Is this

a part-

a partnerſhip between the buyers? I think it is not, but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to ſhare with one another in the profit or loſs. The broker undertakes to buy and ſell, but makes no advance without the ſecurity of the tea-warrants, which are conſidered as caſh, and paſs by delivery, like *Eaſt-India* bonds. Theſe warrants are pawned with the lender, but the broker has no power to pledge the perſonal ſecurity of the principals. He cannot ſell the warrants, and borrow more money on ſuch perſonal ſecurity. It makes no difference, whether ſpecific tea, or the warrants, are delivered at the ſale. It would be moſt dangerous, if the credit of a perſon, who engages for a fortieth part, for inſtance, ſhould be conſidered as bound for all the other thirty-nine parts. *Non hæc in fœdera veni.* The witneſſes did not merely ſpeak to opinion, but to matter of fact, and their own dealings. They ſaid, the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the principals; *they* did not truſt the broker alone; but all others who do not aſk after the principals do. The note is given as a colla-

collateral ſecurity perſonally by the holder of the warrant, not in the character of a partner with other perſons, nor as a broker for them.

Willes and *Aſhburſt* Juſtices, of the ſame opinion.

Buller Juſtice.—This is a very plain caſe. The plaintiffs had no reaſon to conſider the broker as a partner with the other perſons, for though he had a ſhare, he did not act or appear as a partner, nor were they partners as among themſelves. They had never met or contracted together as partners. If this tranſaction were ſufficient to conſtitute a partnerſhip, a broker would have it in his power to make 500 perſons partners, who had never ſeen nor heard of one another, or might at his pleaſure, convert his principals into partners, or not, without any authority from them, by taking joint or ſeparate warrants h.

The rule diſcharged.

h In this caſe the plaintiff had firſt filed a bill in equity, which was diſmiſſed with coſts, the Lord Chancellor being of opinion, that it was merely a queſtion of law.

And

And if money be lent to a trader by a partner who retires from buſineſs, at legal intereſt, with an additional annuity for a certain term of years, it is not to be conſidered a continuance of the partnerſhip; for, under ſuch circumſtances, it was held, in the caſe of *Grace* v. *Smith*[i], to be eſſential to make a perſon ſubject as a partner, that *he* is intereſted in the profits; that is, that the *advantages* which he derives from the trade are *caſual*, as depending on thoſe profits; for if they are certain and *defined*, he is not a partner, as here, where the defendant had been partner with one *Robinſon*, but the partnerſhip being diſſolved, the defendant agreed to let a ſum of 4000*l.* remain in *Robinſon*'s hands *at legal intereſt* for ſeven years, and to *receive beſides an annuity* of 300*l. per annum.* for the ſame time; all of which was ſecured by *Robinſon*'s bond. It was held that this ſhould not make the defendant a partner, and ſubject to *Robinſon*'s contracts; for he had no concern with the buſineſs, and the annuity and intereſt was *certain* and *independent of the profits*.

But in *Bloxam* v. *Pell*, Sittings *Hil.* term 1775, and which is cited in *Black. Rep.* 999.

[i] 2 Black. Rep. 998.

where

where the defendant had been partner with one *Brooke*, and they agreed to ſeparate, and *Brooke* agreed to give him his bond for 2485*l.* with intereſt, which ſum had been brought by the defendant into trade, and an annuity of 200*l.* for ſeven years, if *Brooke* ſo long lived, as in lieu of the profits of the trade; and the defendant had at all times liberty to inſpect *Brooke*'s books.

The defendant was adjudged to be a partner and liable; for the charge had reference to the profits, it was *caſual* as depending on *Brooke*'s life, and his right to inſpect the books was that of a partner.

So that the true *criterion* ſeems to be, the *intereſt of the party in the profits*, and it alſo appears to be neceſſary, in order to charge a perſon as partner on the ground of ſharing in profit and loſs, to ſhew they were concerned not only in the joint purchaſe, but in the *joint ſale*; that is, that their intereſt ſhould continue joint till the time of the ſale, when the profit and loſs would be aſcertained. A man entering into an agreement and afterwards ſubdividing his beneficial intereſt under it, among others, is alone liable to the performance, and the ſub-contract does

does not conſtitute a partnerſhip. Thus in *Coope* v. *Eyre*[k], where an action was brought by the plaintiffs, who were the owners of a *Greenland* ſhip, againſt the defendants, upon an agreement to purchaſe a cargo of oil. The declaration ſtated, that on the 29th of *Auguſt* 1786, the plaintiffs ſold the cargo to the defendants, at the rate of 20 *l. per* ton, to be received as ſoon as it was boiled and ready. That by way of collateral ſecurity, two bills of exchange were depoſited in the hands of the plaintiffs, one of which was accepted by the defendants *Eyre*, *Atkinſon* and *Walton*. That the ſale being ſo made, and it being expected that the defendants would not take away the oil purſuant to the terms of the ſale, it was afterwards agreed between the plaintiffs and defendants, by the name of *Benjamin Eyre* and Co. that the plaintiffs ſhould keep the oil in their poſſeſſion, till the 1ſt of *January* following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authoriſe the broker to re-ſell it at the beſt price he could get; and if upon ſuch re-ſale, the oil ſhould not produce 20 *l. per* ton, with all charges, the plaintiffs were to deduct the

[k] H. Black. Rep. 37.

differ-

difference of the price, out of the bills placed in their hands as a collateral ſecurity. The declaration then ſtated, that the defendants neither paid for the oil, or took it away, and therefore the plaintiffs authoriſed the broker to re-ſell it. That the deficiencies upon the re-ſale amounted to 400 *l.* beſides brokerage, &c. 100 *l.* and that the bill of exchange accepted by the defendants was preſented to them for payment, and refuſed. Before this action was brought, *Eyre* and Co. had become bankrupts. It appeared in evidence on the trial, that on the 24th of *Auguſt*, 1786, the defendants, *Eyre* for himſelf and partners, who were *Atkinſon* and *Walton*, general merchants, *Hatterſley* for himſelf and *Stephens*, who were oil-merchants, and *Pugh* for himſelf and ſon, who were alſo oil-merchants, agreed to purchaſe jointly as much oil as they could procure, on a proſpect that the price of that commodity would riſe; that *Eyre* ſhould be the oſtenſible buyer, and the others ſhare in his purchaſe, at the ſame price which he might give. *Hatterſley* and Co. were to have one fourth, *Pugh* one fourth, and *Eyre* and Co. the remaining moiety. That they bought large quantities of oil, belonging to other ſhips, and other traders, beſides the plaintiffs, in the name of *Eyre* and Co. That *Hatterſley* and *Pugh* occaſionally

caſionally came forwards, and gave directions as to the delivery of the oils, and otherwiſe interfered in the tranſaction; and alſo made many declarations, that they were all jointly intereſted in the different purchaſes, and that there was a general concern between them. On the part of the defendants it was inſiſted, that the contract of ſale was made between the plaintiffs and *Eyre* and Co. only; and that the agreement entered into between themſelves, was only a ſub-contract, and did not conſtitute a partnerſhip; and the learned Judge who tried the cauſe being of the ſame opinion, directed a verdict to be found for the defendants, which was accordingly done. The plaintiffs therefore moved the Court for a new trial, on the ground of miſ-direction; and after the caſe had been fully argued, the Court refuſed to grant a new trial, being of opinion, that the verdict was proper. For as this was an action on a contract of ſale, the vendor can have no remedy againſt any perſon with whom he has not contracted, unleſs there be a partnerſhip, in which caſe all the partners are liable as one individual. It was juſtly obſerved, that a ſecret partnerſhip can be no conſideration to the vendor, though for reaſons of policy and general expedience, the law is poſitive with reſpect to the ſecret partner,

partner, that when diſcovered he ſhall be liable to the whole extent. In many parts of *Europe* limited partnerſhips are allowed, provided they be entered on a regiſter; but the law of *England* is otherwiſe, the rule being, that if a partner ſhares in advantages, he alſo ſhares in all diſadvantages. In order to conſtitute a partnerſhip, a communion of profit and loſs is eſſential: and the ſhares muſt be joint, though it is not neceſſary that they ſhould be equal. If the parties be jointly concerned in the purchaſe, they muſt alſo be jointly concerned in the future ſale; otherwiſe they are not partners. In the preſent caſe *Eyre* was a mere ſpeculator, and the other defendants were to ſhare in the purchaſe, but were not jointly intereſted in any ſubſequent diſpoſition of the property. Though they may by other purchaſes have concluded themſelves as to ſome particular vendors, yet in the tranſaction in queſtion there was not that communion between them, which is neceſſary to make them partners; their agreement was a ſub-contract, which may be executory; as it was to ſhare in a purchaſe to be made. The ſeller looked to no other ſecurity than *Eyre* and Co. To them the credit was given, and they only were liable[1].

[1] H. Blac. 37.

In an *implied* partnership, there ſhould be a moral power, at leaſt, in each individual, of performing what is undertaken on behalf of the whole; and ſince the very *baſis* upon which ſuch a partnerſhip muſt be founded, is the principle of mutual juſtice, ſo muſt alſo the advantages, or diſadvantages ariſing from ſuch implied agreements between the parties, be determinable alone according to the rules of equity, and not ſubject to the expreſs forms of law. Nevertheleſs the cuſtoms of merchants in this country, are univerſally adhered to on deciding upon differences between partners of this deſcription; becauſe thoſe very cuſtoms aim at the prevention of wrong, and are themſelves founded upon the very ſame principles of univerſal equity.

According to the cuſtom of *England*, if two joint merchants occupy their ſtock, goods and merchandize in common, to their common profit, one of them naming himſelf a merchant, ſhall have an account againſt the other, naming him a merchant; and ſhall charge him as *receptor denariorum*, &c[m]. that is, as receiver of the money of him *B.* from whatever cauſe and contract it ſhall redound to the common profit of them *A.* and *B.*[n], as

[m] Co. Litt. 172. lib. Intrat. 17, 18, 19.

[n] F. N. B. 117. D.

may

may be made appear by *Lex Mercatoria*, 10 *H.* 7. 16. a.

In an action upon the caſe [o] againſt *A.* the plaintiff declares upon the cuſtom between merchants, &c. that if two merchants are found in arrears upon account, and they promiſe to pay it at certain days, that any or either of them may be charged ſingly; and then ſhewed the account, that *A.* and *B.* were found in arrears ſo much, &c. and promiſed to pay it at certain days, but did not, and the plaintiff brought his action againſt *A.* only, and reſolved that it lay.

If two joint merchants make *B.* their factor, and one dies, leaving an executor, this executor and the ſurvivor cannot join in an action againſt the factor [p]; for though the duty does not ſurvive, yet the remedy does; and therefore on recovery, he muſt be accountable to the executor for that [q].

Nor can an executor and the ſurviving merchant be jointly ſued, becauſe the firſt is

[o] 2 Roll's Abr. 702, 703.

[p] 2 Salk. 444.

[q] Martin v. Crompe, 1 Ld. Raym. 340.

to be charged *de bonis teſtatoris*, and the other *de bonis propriis* [r].

In an implied partnerſhip, by the cuſtom of *England*, one of two joint-traders accepts a bill [s], drawn on both for him and partner, it binds both if it concerns the trade; but otherwiſe, if it concerns the acceptor only in a diſtinct intereſt and reſpect.

But, [t] if a factor of an incorporated Company draw a bill on ſuch Company, and any member accept it, the acceptance ſhall not bind the Company, nor any other member of it, becauſe it is a private act of the party, and not a public act of the Company.

On the ſame principle, if ten merchants, each in his *individual* capacity, employ one factor, and he draw a bill on all of them, and one accept it, this ſhall bind him and not

[r] Carth. 170, 171. 2 Lev. 228. 3 Lev. 290.

[s] Pinkney v. Hall, 1 Salk. 126. Gilb. L. E. 117, 118. Kyd, 19.

[t] Winch. 24, 25. Styl. 370. Moll. b. 2. c. 10. ſ. 18, 19. 29. Ld. Raym. 175. Salk. 126. 2 Salk. 442. 3 Bac. Abr. 611. 5 Mod. 398. 12 Mod. 345. Hard. 485. Vent. 152. Lev. 198.

the

the reſt, becauſe they are ſeparate in intereſt, the one from the other.

Whether a corporation, which has not a ſpecial power expreſsly given for the purpoſe, can be concerned in drawing, or accepting a bill of exchange or promiſſory note, or in the negotiation of either, or can be made the payee, is a queſtion which ſeems never to have had the conſideration of a Court; perhaps, becauſe nobody has ever entertained a doubt on this head [u]. And it ſeems to have been taken for granted by the Legiſlature [x] and it is conſiſtent with the general principles of law, that, by the intervention of an agent or ſervant lawfully authoriſed, a corporation, on which no reſtraint is impoſed in its original conſtitution, might in this reſpect act as a natural perſon. There is, however, a *proviſo in this Act*, that no body politic or corporate ſhall have power, by virtue of it, to iſſue or give out notes, by themſelves or their ſervants, other than ſuch as they might have iſſued, if this Act had not been made.

The bank of *England* has a ſpecial power conferred on it for this purpoſe [y].

[u] Vide Edie v. Eaſt India Company, 2 Burr. 1216.

[x] 3 & 4 Ann. c. 9.

[y] 5 W. & M. c. 20. ſ. 28.

Where a bill or note is drawn in favour of two or more, in partnership with one another, an indorsement by one will bind both, if the instrument concern their joint-trade: so[z], where it is in favour of them, *or* either of them, an indorsement by one is a sufficient transfer, though they be not in partnership.

So, where a bill drawn by two is made papable to them or their order, it would seem from principle, that either might transfer without the other; for when two persons join in the same bill, *they hold themselves out to the world as partners, and, for that purpose are to be treated as such.* [a].

[z] Kyd 68.

[a] Doug. 630.

CHAPTER III.

Partnership—

DIFFERENT KINDS.

AS the proper object of partnership is to facilitate the undertaking, work, trade, or commerce for which the partnership is contracted: and to secure to every one of the partners out of the share which he has contributed, in conjunction with his co-partners, such profits and advantages as none of them could be able to make by themselves; it may be fit to enquire what are the different kinds of partnerships which tend to produce such effects? And under that description are classed those partnerships which demand the united labor, industry, care, credit, money, and other assistance of several persons for the purpose of increasing trade and commerce, either foreign or domestic, and thereby rendering the science of commerce more beneficial to the services of the state, and profitable as well as honourable to the merchants and traders themselves.

It is common for persons to enter either into a general partnership or society of *all*

their goods [a], or into a particular partnerſhip which regards only ſome ſingle ſpecies of commerce; and the ſtock and effects which are put into the partnerſhip, become common to all the partners, altho' they are not delivered, (after an agreement executed between the parties) and altho' they remain in the poſſeſſion of that partner who was the owner of them before the partnerſhip was contracted. For, (by conſtruction of law) the intention of the partners to communicate the goods, according to agreement, makes a *tacit* delivery of them, and each of the partners poſſeſſes for all the others, that which belongs to them in common, which is in his cuſtody; each of them being poſſeſſed *per my et per tout.*

The king by his charter may conſtitute fraternities, or companies, for the management of foreign or domeſtic trade [b].

For trade cannot be maintained or increaſed without order and government [c]; and therefore, the king may erect *gildam mercato-*

[a] χοινωνιαν, *i. e.* Communion, Juſt. de Societate, lib. 3. tit. 26.

[b] Com. Dig. Trade, (B.)

[c] Com. Dig. Trade, (D.)

riam,

riam, a fraternity or incorporation of merchants, for the advantage of trade [d].

And none but the king can erect a ſociety for trade, or public trading company [e].

But the king by his charter cannot make a total reſtraint of trade, for ſuch a patent would be void [f].

None of the public trading companies incorporated by royal charter in this country for the purpoſe of trade, are to be conſidered as partnerſhips, within any of the legal principles applicable to partnerſhips formed by the voluntary agreement of individuals. For in ſuch chartered companies where a trade is to be carried on under the corporate name in joint ſtock (as is the caſe with the *Eaſt-India* Company, *&c.*) there are expreſs proviſions that the members are not liable, on account of the joint trade, in their individual capacities; nor one of them for the debts or engagements contracted by others; but only for their reſpective ſhares or intereſt in the joint ſtock, and that upon trade, and

[d] 8 Co. 125. a.

[e] Skinner 224.

[f] 3 Mod 132.

contracts

contracts carried on, or made in the corporate character of ſuch chartered bodies.

Therefore if one or more perſons enter into ſuch a ſociety, and become ſharers of the property and joint ſtock, yet ſuch a joining together does not conſtitute partnerſhip according to the cuſtom of merchants, nor within the principles of law eſtabliſhed reſpecting joint traders.

Partnerſhip, which, in *arithmetic* is denominated *Fellowſhip*, or the mode of adjuſting partnerſhip accounts and profits, is a rule of great uſe in balancing accounts amongſt merchants, and owners of ſhips; where a number of perſons putting together a general ſtock, it is required to give every one his proportional ſhare of loſs, or gain.

The *golden rule* ſeveral times repeated, is the baſis of *fellowſhip*, and fully anſwers all queſtions of that kind: for as the whole ſtock is to the total thereby gained, or loſt; ſo each man's particular ſhare is to his proper ſhare of loſs or gain. Wherefore, the ſeveral ſums of money of every partner are to be gathered into one ſum, for the firſt term; the common gain, or loſs, for the ſecond; and

and every man's particular ſhare for the third; and the *rule of three* is then to be wrought ſo many times as there are partners.

There are two caſes of this rule in arithmetic, the one *without*, the other *with time*.

Fellowſhip *without time*, is where the quantity of ſtock, contributed by each perſon is alone conſidered; without any particular regard to the length of time that any of their monies were employed. For example: *A. B.* and *C.* freight a ſhip with 212 tons of wine; *A.* laying out 1342 *l.* *B.* 1178 *l.* and *C.* 630 *l.* towards the ſame; the whole cargo is ſold at 32 *l.* *per* ton. Q. What ſhall each perſon receive?

Find the whole produce of the wine by multiplying 212 by 32, which yields 6784. Then, adding together the ſeveral ſtocks, 1342, 1178, and 630, which makes 3150, the work will ſtand thus:

3150 :	6784	1342	Anſw. 2890, 1993, &c.
		1178	2537, 0006, &c.
		630	1356, 8.
Proof		3150	6784.

Fellow-

Fellowſhip *with time*, is where the time wherein the money, &c. were employed, enters into the account. As for example, *viz. A. B. C.* commence a partnerſhip the firſt of *January*, for a year. *A.* the ſame day diſburſed 100 *l.* whereof he received back again, on the firſt of *April*, 20 *l.* *B.* pays, on the firſt of *March*, 60 *l.* and more, the firſt of *Auguſt* 100 *l.* *C.* pays, the firſt of *July*, 140 *l.* and, the firſt of *October*, withdraws 40 *l.* At the year's end their clear gain is 142 *l.* Qu. What is each partner's due g? *A.*'s 100 *l.* multiplied by three months, the time it was in, makes 300 *l.* and the remaining 80, by nine months = 720, in all 1020 *l.* of *A.*'s contribution. For *B.* 60, into 10, gives 600; and 100 into 5, 500; in all 1100 *l.* for *B.* For *C.* 140 into 3, gives 420; and 100 into 3, is 300; in all 720 *l.* for *C.* Now, 1020+1100+720=2840 for the common antecedent, and the gain 142, is for the general conſequent; the rule will ſtand thus:

2840 : 142	1020	Anſ.	51
	1100		55
	720		36
Proof	2840		142

‡ N. B. All the particular times (if not ſo given) muſt be reduced into one denomination, viz. into years, months, weeks, or days.

By

By the *Roman* Law, the ſocial contract, or partnerſhip, needed no other ſolemnity, but the ſole conſent of parties, without any writing at all.

The *French* diſtinguiſhed three kinds of mercantile *ſociety*; *ordinary ſociety*, called alſo *collective* and *general*; *ſociety* in *commendam* or *commandity*; and *anonymous ſociety*, called alſo *momentary* and *inconnue*.

The firſt was where ſeveral merchants acted alike in the affairs of the *ſociety*, and did all under their collective names, which were public, and known to every body.

Society in *commendam*, &c. was that between two perſons, one of whom only put his money into ſtock, without doing any other office of a copartner; the other, who was called the *complementary* of the *ſociety*, diſpatching all the buſineſs under his own name. This *ſociety* was very uſeful to the ſtate; inaſmuch as all kinds of perſons, even nobles, and profeſſional men, might contract it, and thus make their money of ſervice to the public; and thoſe who had no fortune of their own to trade withal, hereby found means of eſtabliſhing themſelves in the world, and of making

making their induſtry and addreſs ſerviceable.

Anonymous ſociety was *that* where all the members were employed, each particularly, in the common intereſt, and each was accountable for profits, &c. to the reſt; but without the public's being informed thereof; ſo that the ſeller had only an action againſt the particular buyer, no other name appearing.

It was alſo called *momentary*, becauſe frequently made on particular occaſions, and ceaſing with them: as in the making a purchaſe, the ſelling any commodity, &c.

Of this they diſtinguiſhed four kinds: *ſociety by participation*, which was uſually formed by letters from one city to another, where a merchandize was to be bought or ſold. The ſecond was, when two or three perſons went together to fairs to buy goods. The third, when two or three perſons agreed to buy up the whole of ſome commodity, in any country, to ſell it again at their own price. And the fourth was, when three or four perſons made a journey together, to buy and ſell the ſame commodity. Beſides merchants, people

ple of quality, &c. were admitted into these *anonymous societies.*

Although partnership, or fellowship, and company, or society, according to the civil law writers, mean much the same thing; yet the custom of *England* has made a difference between them; partnership, being understood of two or three dealers, or not many more; and *company* usually of a greater number; such are the fraternities of the several professions and trades incorporated within the city of *London.* So also the *East-India* Company, or other like corporations, which cannot be established without the concession of the Sovereign, by letters patent, charters, &c. Whereas in partnership, the bare consent of the partners, fixed and certified by acts or contracts, is wholly sufficient; which acts or contracts are made for the reciprocal advantage of all who engage therein, and in which such care is necessarily exacted from each partner, as every prudent man commonly takes of his own concerns in life; consequently each partner should be answerable for wilful neglect in the joint trade or commerce so engaged in for their mutual benefit.

Partnerſhips in trade differ from one another according to the degrees of intereſt, and the intention of the perſons who join in them; and they are, either, where all the partners appear oſtenſibly, or, where ſome of them are dormant; with a view to conſider the nature of ſuch partnerſhips, I ſhall proceed to claſs the different kinds as they ſeem to occur in the ordinary courſe of mutual dealings and tranſactions in trade.

And ſuch partnerſhips in trade may be claſſed under two heads, namely, *general*, and *ſpecial*.

Firſt, *general*, for the ordinary purpoſes of carrying on trade.

Secondly, *ſpecial*, for a particular concern, or in a ſingle dealing or tranſaction, as part-owners of ſhips, and for a ſingle voyage under a charter-party of affreightment, or otherwiſe.

CHAPTER IV.

Partnership—

general.

ACCORDING to the tenor of the *civil* law, it would ſeem that a *general* partnerſhip included in it every thing that might belong to the partners, either *real* or *perſonal*, or which they might acquire by any lawful cauſe whatſoever. But, in order to purſue the plan preſcribed in the foregoing chapter, it may be ſufficient for me to conſider the nature of a general partnerſhip, as far as it applies to the ordinary courſe of mutual dealings and tranſactions in trade, which reſpects only *perſonal chattels*, and is regulated by the *law merchant* as eſtabliſhed in equity, and confirmed by common law.

Where two or more merchants agree to join together in any way for the purpoſe of carrying on trade, they are ſaid to be in company, and muſt be conſidered partners. And by the law merchant, which is part of the law of *England*[a], they are recognized and

[a] Co. Lit. 11. b. 2 Roll. Abr. 114.

treated as partners, whether there was an *expreſs* agreement entered into by the parties or not, provided they appear oſtenſibly to the world as joint-traders.

In ſuch a *general* partnerſhip, where an individual merchant deals with either of them, he goes upon the *credit of the whole* [b], conſidering the act of one, in a joint concern, as the act of the whole copartnerſhip firm, throughout the ordinary courſe of general trade.

So in the caſe of —— v. *Layfield* [c], where there are ſeveral partners, and a man *goes upon the credit of all*, the act of one ſhall be preſumed the act of all, and is evidence againſt the reſt, to bind the whole, unleſs either of them can ſhew a diſclaimer, or refuſal to be concerned. In this caſe *Layfield* and the other defendants were bankers, and *Layfield* ſold a lottery ticket in the *double* exchange lottery (in which ſeveral bankers were truſtees) to the plaintiff, and undertook to pay the prize ariſing from it, the other partners were held to be liable, no diſclaimer appear-

[b] 3 Bac. Abr. 590.

[c] Niſi Prius, per Holt, Ch. J. 1 Salk. 292.

ing;

ing; for the lottery having been conducted by bankers, the plaintiff appeared to be well grounded in looking to the joint-credit of *Layfield*'s partners. But, notwithſtanding, where the perſon bringing the action has looked to the faith of ſeveral partners, who are in buſineſs together, and has relied upon their joint-credit, though but one only of the partners acted, the proof of the act of one ſhall charge them all; yet it muſt be made out in an action at *common law* [d], that ſuch *debt* or *contract* was *joint*, before the other partners ſhall be charged.

"For in *aſſumpſit* againſt ſeveral, *a joint* "*debt or contract* muſt be proved; otherwiſe "the proof would not correſpond with the "declaration." Yet Courts of *Equity* have governed themſelves by more general rules, as to the mode of proof.

And here occurs that moſt excellent definition of the mode of *proof*, as laid down by Mr. Juſtice *Blackſtone* [e], in his chapter of proceedings in the Courts of Equity. "And, "firſt as to the mode of *proof*. When facts,

[d] Buller, N. P. 129.

[e] Black. Com. vol. 3. p. 437.

" or their leading circumſtances, reſt only in " the knowledge of the party, a Court of " Equity applies itſelf to his conſcience, and " purges him upon oath with regard to the " truth of the tranſaction; and that being " once diſcovered, the judgment is the ſame " in equity as it would have been at law. " But, for want of this diſcovery at law, the " Courts of Equity have acquired a concur- " rent juriſdiction with every other court in " all matters of account. As incident to ac- " counts, they take a concurrent cognizance " of the adminiſtration of perſonal aſſets, con- " ſequently of debts, legacies, the diſtribu- " tion of the reſidue, and the conduct of exe- " cutors and adminiſtrators. As incident to " accounts, they alſo take the concurrent ju- " riſdiction of tithes, and all queſtions relating " thereto; of all dealings in partnerſhip, and " many other mercantile tranſactions." So that partnerſhips are properly cognizable by Courts of Equity; and it is certainly for the advantage of trade, that mercantile tranſactions are not ſubject to be reſtrained by all the technical forms of law.

Thus in *Trin.* 1693, after much conſideration, it ſeems to have been eſtabliſhed in a caſe

caſe[f] where *A.* and *B.* were partners. *A. borrowed money*, and gave his note ſubſcribed for ſelf and *company*. There was no proof[g] that the money was brought into ſtock, but the *money was paid in the ſhop*. *Per Cur.* The note of one partner (the money being paid in the ſhop) binds both, and though *at law* the note ſtands good only againſt the executor of the ſurviving partner, who was *A.* who received the money and ſigned the note, yet it is proper *in equity* to follow the eſtate in *B.* for ſatisfaction; and decreed accordingly. It appears that this caſe, after a diſmiſſion by the Maſter of the Rolls, was heard on appeal, *Mich.* 1692. when no notice is taken of any mention to have been made of the circumſtance of the money's being paid in the ſhop, and yet then[h] the Court declared they took it that both partners were bound.

And ſuch may be conſidered the invariable practice of merchants in their dealings and tranſactions, where there is a general partnerſhip to carry on trade. But, where two entered into *articles* of copartnerſhip, each

[f] 2 Vern. 292.

[g] 16 Vin. Ab. 243.

[h] See 2 Vern. 277.

brought in 1000 *l.* ſtock. There was to be no benefit of ſurvivorſhip, neither was to become indebted without the other, nor either to take out of the ſtock without the other. One became *indebted without the conſent of his partner*, and made his wife executrix, and died. The wife *confeſſed judgment* for the debt. The other ſues for an account and relief againſt the creditor and the wife. They confeſs the *articles*, and the obtaining judgment. Lord Chancellor granted an injunction againſt the judgment, becauſe the debt related not to the partnerſhip, ſaying, if this be ſuffered, no trade could be in ſuch caſe [i].

So where three perſons entered into partnerſhip in the trade of ſugar-boiling, and agreed that no ſugars ſhould be bought without the conſent of the majority [k]; one of them afterwards makes a proteſt that he would no longer be concerned in partnerſhip with them. The two other perſons after make a contract for ſugars, the ſeller having notice that the third had diſclaimed the partnerſhip, he ſhall not be charged.

i Vin. Ab. 16. ſ. 242.

k Mumit v. Whitney, M. S. Tab. 14 June 1721. Vin. Ab. 16. ſ. 244.

In

In a general partnerſhip to carry on trade, the *ſale* by one partner is the ſale by all, and therefore though one ſells the goods, or merchandiſeth with them, yet action muſt be brought in all their names; and in ſuch caſe the defendant ſhall not be received to wage his law, that the other partner did not ſell the goods to him, as is ſuppoſed in the declaration. *Lambert*'s caſe [l], *Hil.* 11 *Jac.* C. B. In a general partnerſhip, payment to one of the partners is payment to all [m].

So, if they all, except him to whom the payment was made, were bankrupts, the payment is only unavoidable as to his proportion [n].

And if there be four partners, whereof three are bankrupts, and their ſhares aſſigned, and a payment is made to him that was no bankrupt, it is a payment to all the aſſignees; for now they are all partners [o].

l 1 Godb. 244.

m 12 Mod. 447.

n At Niſi Prius, cor. Holt Ch. J. Vin. Ab. v. 16. 245.

o 12 Mod. 447.

If two be found in *arrearages of account* by the cuſtom of merchants, one may be charged to pay all the debt as well as both [p].

Among merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object againſt it in a ſecond or third poſt; *per* Commiſſioner *Hutchins* in the caſe of *Sherman* v. *Sherman*, where there had been a general partnerſhip, and ſome differences and diſputes had ariſen [q].

If one partner borrows any money out of the general partnerſhip trade, his own ſhare ſhall be anſwerable for it, and ſhall not be permitted to come into equity and pray an account, without making a ſatisfaction for the debt [r].

If there are two partners in trade [s], and one buys goods for both, and the other dies, the ſurvivor may be charged by *indebitatus aſſumpſit* generally, without taking notice of the

[p] Per. Roll. Ch. J. Sti. 243.

[q] 2 Vern. 276.

[r] Abr. Equ. Caſes, 9 Trin. 1728.

[s] Hyatt v. Hare, Comb. 383.

partner-

partnerſhip, or that the other is dead, and he ſurvived.

Though there is no ſurvivorſhip amongſt merchants, [t] yet if two joint-merchants contract with a bailiff, the contract is entire and joint, and by the death of the one ſurvives to the other. Now ſuppoſe a factor ſhould bring his action for his wages, it muſt be with the ſurvivor only [u].

Sometimes indeed all the partners in trade do not appear oſtenſibly to the world, though they ſhare in the profits and loſs; and it is not unuſual for gentlemen of large and independent fortunes to embark very conſiderable ſums of money in trade; they being oftentimes ignorant of the *ſcience* of commerce, and meaning to depend entirely upon the ſkill of merchants or traders with whom they engage, in a general partnerſhip of all their ſtock and effects, yet not ſuffering their names to appear in the copartnerſhip firm; but at the ſame time receiving a proportionate ſhare of the profits ariſing out of their joint trade, bearing equally their riſk of loſs; and ſuch

[t] Wynch. 52 arg.

[u] Per Holt Ch. J. Comb. 474.

are-

are uſually ſtiled *dormant* partners. And the law reſpecting ſuch *dormant* partners Lord *Mansfield* was pleaſed to ſay, in the caſe of *Hoare* v. *Dawes* [v], is not diſputed, *viz.* "that they are liable when diſcovered, becauſe they would otherwiſe receive uſurious intereſt without any riſk."

And it has alſo been determined that a *dormant* partner may be, without having ſerved an apprenticeſhip to the particular trade, under the ſtatute of *Eliz.* [w]; as in the caſe of *Raynard* v. *Chaſe* [x], wherein it was held that one not qualified to exerciſe a trade himſelf by having ſerved an apprenticeſhip, entering into partnerſhip with a qualified perſon, and only ſharing the profits and ſtanding the riſks of the partnerſhip, without ever interfering in the trade perſonally, is not within the ſtatute 5 *Eliz. c.* 4.

This was an action of debt for a penalty on 5 *Eliz. c.* 4. for exerciſing *the trade of a* brewer, without having ſerved an apprenticeſhip. In the declaration there were two counts. To the former "*nil debet*" was

[v] Doug. 371.

[w] 5 Eliz. c. 4.

[x] 1 Burr. 2.

pleaded:

pleaded: and there was a general verdict for the defendant; (*viz.* "That the defendant does not owe, &c.") But on the second count there was a special verdict, which was to the following effect, *viz.* that the defendant *Chase* and one *Coxe*, were, and have been during all the time charged in this count, as partners in the trade; and that the trade was carried on, and has been for four years carried on, in their *joint* names: that *Coxe* did serve an apprenticeship, &c. but *Chase* never did; and that *Coxe is a working brewer*, and was paid a salary for his labour; which salary was always deducted, and allowed him, *previous* to a division of the profits; and the entries at the Excise-office were in their *joint* names: but that the defendant *John Chase* never *exercised the trade himself*, (which was wholly managed and carried on by *Coxe*) but *only shared the profits and stood the risks* of the partnership. And they find it to be a trade within 5 *Eliz. c.* 4. Question on 5 *Eliz. c.* 4. *s.* 31. "whether the defendant *John Chase* is within the act, upon this special finding?"

Mr. *Moreton pro quer.*

This attempt to evade the force of the act by the scheme of a partnership *with a qualified*

fied trader, would entirely fruſtrate the *intention*, and is directly contrary to the *words* of the act.

The ſhort of this caſe is, *Chaſe not being* himſelf *qualified*, takes a partner *who is qualified*; which qualified partner is the only *acting* perſon in carrying on the trade and *Chaſe never interfered* in it.

There was the like point before the Court in *P.* 13 *G.* 2. *B. R. Rex* v. *Driffield.*

But *per Deniſon* and *Foſter* Juſtices, that caſe was never determined: it went off upon an objection to the juriſdiction.

Morton.—But the Lord Ch. J. *Lee* then ſaid, "that he had never known a perſon "exempted from the ſtatute who had not "ſerved an apprenticeſhip."

And as to his not interfering in the trade in the caſe of *Hobbs qui tamy*,&c. *verſus Young*, reported in 2 *Salk.* 610. and in *Carthew* 162. and in 3 *Mod.* 313. is a determination in point, and not to be diſtinguiſhed from the preſent caſe.

y Hil. 1 & 2 Will & M. Holt C. J. 66.

Therefore

Therefore he prayed judgment for the plaintiff.

Mr. *Biſhop contra, pro defend'*, ſaid, he would firſt conſider how this matter ſtood *before the ſtatute*, with regard to the free and unlimited right that every man naturally and legally had, of exerciſing whatever trade he pleaſed; ſecondly, the *conſtructions* that have been *favourably* made upon it *in extention* of the qualifications to exerciſe trade; and thirdly, diſtinguiſh this caſe from the caſes cited.

And firſt, the liberty of trade is a natural and common-law right, and was long unreſtrained. The ſtatute of 37 *E.* 3. *c.* 5. which *firſt reſtrained* it, was very ſoon *repealed* by 38 *Ed.* III. *c.* 2. and Lord *Coke* in 4 *Inſt.* 31. ſays, "That ſuch acts of Parliament ne-"ver live long." He cited the caſe in 2 *Bulſtr.* 186. *Dominus Rex* and *Allen* plaintiffs againſt *Tooley* defendant, is an authority for him, though the Court did not formally pronounce any final judgment therein, and he alſo cited 11 *Co.* 53, the caſe of the Taylors of *Ipſwich*. Secondly, the before mentioned caſe in 2 *Bulſtr.* 186, The *King* and *Allen* v. *Tooley*, proves the conſtruction to have been

favourable. *Jenk. Cent. caſe* 15, *p.* 284. "A private brewer is not within the ſtatute. *Keilwey* 96. *pl.* 6, proves the ſtatute ought to be taken ſtrictly, being penal, and in derogation of the common law. And Judges have diſpenſed with the rigour of it as in *Foth*'s caſe, 1 *Salk.* 67. where ſeven years apprenticeſhip beyond ſea, though without binding, was holden ſufficient. So *Queen* v. *Maddox*, 2 *Salk.* 613. S. P. accordingly, and the Court there call this ſtatute 5 *Eliz.* a hard law, *Comberb.* 254. *Rex* v. *Goller*, *per Eyre* Juſtice, one brother living with another ſeven years (at the trade of a tallow chandler) though not bound, may ſet up the trade, 1 *Mod.* 26. *pl.* 69. *Dominus Rex* v. *Tarnith*, proves too that this ſtatute ought not to be extended further than neceſſity requires.

Now it is not found by the preſent ſpecial verdict, in the affirmative, "That this man has occupied, uſed, and exerciſed the trade:" but it is found (on the contrary) negatively, "That he has not *interfered* in it; but it was "wholly carried on by *Coxe*." And *Hob.* 298. ſays the rule is, "That affirmatives in "ſtatutes that introduce new laws, imply a "negative, *&c.*" However here is an *expreſs* negative.

Thirdly,

Thirdly, with regard to the caſes cited—As to *Rex* v. *Driffield*, whatever was found in the affirmative in that caſe is found in the negative here. And as to the caſe of *Hobbs* v. *Young*, there was *no partner* ſkilful in the trade but only *ſervants:* whereas here is a ſkilful partner to conduct it; and the ſervants are employed to ſet to work by *this partner*, who is ſkilful; and are *not* employed and ſet on work *by* the defendant.

Then he added (fourthly) ſome arguments *ab inconvenienti.*

Firſt, this will affect all great undertakings, for it ſeldom happens in ſuch great undertakings that all the partners are duly qualified, in ſtrictneſs. So likewiſe, it would affect all caſes where *infants* and *truſtees* are intitled to ſhares of profitable trades. So where *creditors* have ſhares in them.

And *apprenticeſhips* in *great breweries* are not in fact uſual or cuſtomary.

Mr. *Morton*, in reply, premiſed, that the rule of conſtruction upon this Act muſt be *uniform*, with regard to *all* the trades within it: and *breweries* cannot be diſtinguiſhed from the reſt.

In

In anſwer to Mr. *Biſhop*'s argument, he obſerved,

Firſt, It is of no importance what was the right before the ſtatute: the ſtatute was made *expreſsly*, to reſtrain ſuch right in future, for the good of the public.

Secondly, He ſaid, he did not want to *extend* this law; this caſe is fully and compleatly *within* it without ſtraining it at all. And the conſtructions that Mr. *Biſhop* calls favourable, in the inſtances which he has cited, are no more than juſt and reaſonable, upon the circumſtances of the reſpective caſes in which they were made.

Thirdly, As to the negative-*finding* in the preſent caſe, it amounts to no more than "that this man did *not mind his buſineſs*;" (which the other partner did). And as to ſetting to work, it is plain that *Coxe* is ſet to work by *Chaſe:* and *virtually* he ſets all the ſervants to work. Indeed *Coxe* is here both a journeyman and a partner to *Chaſe*, for *Chaſe* pays him as a journeyman, and beſides that gives him a ſhare of the profits, and my Lord Ch. J. *Holt*'s opinion in the caſe of *Hobbs* and *Young* is quite applicable to the preſent caſe.

Fourthly,

Fourthly. He endeavoured to ſhew that the conſtruing this man to be within the penalty of the ſtatute, could not be attended with any ſort of inconvenience; therefore he prayed judgment for the plaintiff.

As this was the firſt argument, it was expected (as of courſe) that it would be argued again: but Lord *Mansfield* gave his opinion immediately, to the following effect:

Lord *Mansfield*.—Where we have no doubt we ought not to put the parties to the delay and expence of a farther argument; nor leave other perſons who may be intereſted in the determination of a point ſo general, unneceſſarily under the anxiety of ſuſpence.

The defendant is to ſhare the profits with *Coxe* in moieties, and is liable to the debts of the partnerſhip: but it is *poſitively and expreſsly* found "that during all the time charg-"ed *he* never acted *in or* exerciſed *the trade*." He was not, by the *terms* of his agreement, to act in the trade, the other partner was to do the whole, and had a particular ſalary on that account. It is not found that either *Coxe* or any ſervant under him was ſet to

work *by Chaſe*, nor that *Chaſe* did *any act* whatever of exerciſing the trade, he was only concerned in the *profit*.

Now though this may be to ſome *purpoſes* exerciſing a trade in reſpect of third perſons who deal with the partnerſhip as *creditors* and within the meaning of the *ſtatutes concerning bankrupts*, yet the preſent queſtion is, "Whether it be exerciſing the trade contrary to this act?"

I think Mr. *Biſhop* has laid his foundations right, againſt extending the penal prohibition beyond the expreſs letter of the ſtatute.

1ſt. This is a *penal* law.

2dly. It is *a reſtraint of natural* right. And

3dly. It is *contrary to the general* right given by the *common law* of this kingdom.

I will add,

4thly. The policy upon which the Act was made, is from experience become doubtful.—Bad and unſkilful workmen are rarely proſecuted.

This

This act was made early in the reign of Queen *Elizabeth*. Afterwards, when the great number of manufacturers who took refuge in *England* from the Duke of *Alva*'s perſecution had brought trade and commerce with them, and enlarged our notions, the reſtraint introduced by this law was thought ſo *unfavourable*, that in 33 *Eliz.* in the Exchequer (4 *Leon.* 9 *Pl.* 39.) it was conſtrued away; for it was holden clearly by the judges in that caſe, which conſtruction however I take *not* to be law *now*, "That if one hath "been an apprentice for ſeven years at *any* "one trade mentioned within the ſaid ſtatute, "he may exerciſe *any trade named in it*, "though he hath *not* been an apprentice "to it."

All theſe obſervations only ſhew, "That "this act, as to what enforces the *penalty* of "it, ought to be taken *ſtrictly*;" and accordingly the conſtructions made by former judges have been favourable to the qualifications of the perſons attacked for exerciſing the trade, even where they have not *actually* ſerved apprenticeſhips. They have, by a liberal interpretation, *extended the qualifications* for exerciſing the trade *much beyond* the letter of the act; and have *confined* the *penalty* and *prohi-*

bition to cases *preciſely within* the expreſs letter. Let us conſider whether the *preſent* caſe be within the *letter* or even the *meaning* of this act.

The *general policy* of the act was to have trades carried on by perſons who had *ſkill* in them.

Now here the *perſonal* ſkill of the defendant makes no *real* difference in the caſe; for the perſon who is ſkilful, *acts every* thing, and *receives no directions* from this man; he neither did, nor was to interfere.

The caſe of *Hobbs* and *Young* is not parallel. There the defendant, a *ſingle* man, directed the whole trade; was the *maſter*; and *directed* all the ſervants *as between maſter* and *ſervant*; no doubt it is the *maſter* who carries on the trade, and not *the ſervant*. But in *Hobbs* and *Young* there was *no partnerſhip*; nor (what is the diſtinguiſhing character of the preſent caſe) *a mere naked* ſharing of the profits, and riſqueing a proportion of the loſs; without his acting or directing at all, in any manner whatſoever.

In

In many conſiderable undertakings, it is abſolutely neceſſary to take in perſons as partners to ſhare the profits and riſque the loſs. And the general uſage and practice of mankind ought to have weight in determinations of this ſort, affecting trade and commerce, and the manner of carrying them on. It is notorious that many partnerſhips are entered into, upon the foundation of one partner contributing induſtry and ſkill, and the other money. Many great breweries and other trades have been carried on for the benefit of infants and reſiduary legatees, under the direction of the Court of Chancery. Now if the plaintiff's conſtruction was to hold, the whole direction and decree of the Court of Chancery was contrary to law, and to an expreſs act of Parliament. So it is likewiſe practiſed in *other* great trades. The late Mr. *Child* directed his buſineſs of a *banker* to be carried on for the benefit of his children and other perſons. Many other inſtances might be mentioned. It would introduce the utmoſt confuſion in affairs of trade and commerce, if this conſtruction ſhould prevail. On the *other* hand, I ſee no inconvenience. It is exactly the ſame thing as to the trade in every *iota*, "whether this partner has or has "not ſerved an apprenticeſhip." Therefore

I think the defendant *not* liable to the *penalty* of 5th *Eliz.*

Mr. Juſtice *Deniſon* ſaid that this was a new caſe. For though the caſes of *Rex* v. *Driffield*, and *Adcock* v. *Gele*, were indeed before the Court, yet *no opinion* was delivered in either of thoſe caſes.

He concurred that it was *not* an *exerciſe* of trade *within* 5 *Eliz.* The true intent of that act was, that no man ſhould *exerciſe* any of thoſe trades, unleſs he had *ſkill* in them. It has never been extended by any liberal conſtruction of it, in point of enforcing the *penalty.* And the preſent queſtion is, " whether this man has *exerciſed* the trade, within the meaning of it, ſo as to be *liable to the penalty* ?"

Now it is here found, " that he *never* did *interfere* in the trade *himſelf.*" In the caſe of *Hobbs* v. *Young*, the defendant was the ſuperintender of the work, and *did exerciſe* the trade, without having any ſkill in it. *And this* is the *point in queſtion*, and the principal determination in that caſe of *Hobbs* v. *Young*, whatever elſe might drop from the Judges in giving their opinion. But *here* the defendant

fendant *never meddles at all*, but leaves all the *management* to a partner who had ſkill; he himſelf *never acted* in carrying on the trade.

It may be ſaid indeed, "that *Chaſe* is liable to the *ſtatutes of bankrupts.*" True; but the conſtructions of *thoſe* acts made for the benefit of the bankrupt's creditors, is very different from the conſtruction of this *prohibitory* and *penal* act; which ought to receive a *ſtrict* conſtruction in point of extending the *penalty*.

Therefore for theſe reaſons, and thoſe given by the Lord Chief Juſtice, he held, "that this was a *not exerciſing* the trade within "the act."

Mr. Juſtice *Foſter* concurred; and ſaid, he had prepared himſelf to give his reaſons at *large*; but as the Lord Chief Juſtice had gone through them ſo fully, and inforced them in ſo clear and ſatisfactory a manner, he would only, *in general*, declare his concurrence.

Mr. Juſtice *Wilmot* was of the ſame opinion.

By the Court unanimouſly judgment was given for the defendant.

CHAPTER V.

Partnerſhip—

Special.

IN this chapter I am to treat of *ſpecial* partnerſhip, in contradiſtinction to ſuch as is *general*. Throughout the common occurrences of trade and merchandize, partnerſhip becomes ſpecial, from ſome peculiar circumſtances which ariſe out of the nature of the contract, or the condition of the parties contracting, and it is uſually contracted for a particular concern, or for a ſingle dealing or tranſaction.

In many parts of *Europe*, confined and limited partnerſhips are contracted and allowed, provided the parties have ſuch agreements entered on a regiſter; and the riſk of loſs in ſuch caſe is very frequently limited and confined to one ſide only, and uſurious intereſt may conſequently be received without incurring any riſk: to remedy which ſuppoſed evil in this country, limited partnerſhips have been diſallowed in our courts here; for in *England* the rule is ſaid to be [a], that if a

[a] H. Blac. 37.

partner

partner ſhares in the advantages, he ſhall alſo ſhare in all the diſadvantages of the partnerſhip concern.

This ſubject appears to have been diſcuſſed by writers upon the civil law, and a queſtion hath ariſen, If *A.* and *B.* ſhould covenant between themſelves that *A.* ſhould receive two parts of the profit, and bear but a third of the loſs, and that *B.* ſhould bear two parts of the loſs, and receive but a third ſhare of the profit, whether ſuch an agreement ſhould be binding? Some have been of opinion, that ſuch a covenant was contrary to the nature of partnerſhip, and ought not therefore to be ratified; but, a different opinion ſeems to have prevailed, and for this reaſon, becauſe the labour of ſome is ſo highly valuable, that it is but juſt, that they ſhould be admitted into partnerſhip upon the moſt advantageous conditions. Another opinion hath alſo obtained amongſt them, namely, that a partner may by agreement take a ſhare of the profit, and not be accountable for any part of the loſs; and it is ſaid that this might be done equitably: but then it muſt be ſo underſtood, that, if profit accrues from one ſpecies of things and loſs from another, only what remains, after the loſs is compenſated, ſhall be looked

looked upon as profit. Yet, according to the conſtruction of our laws at the preſent day, it appears to be the received opinion, that, in order to conſtitute a partnerſhip, though ever ſo ſpecial in its nature, a communion of profit and loſs is eſſential: and the ſhares muſt be joint, though it is not neceſſary that they ſhould be equal [b].

Partnerſhip may be ſaid to be *ſpecial*, when it is contracted for a particular concern or for a ſingle dealing or tranſaction, as by part-owners of ſhips; and for a ſingle voyage under a charter-party which is an agreement by indenture, whereby the owners, maſter and freighters of a ſhip covenant with each other, that ſuch a ſhip ſhall be fit and ready to ſail, take in ſuch and ſuch lading, carry and tranſport the ſame to ſuch place or places, in conſideration whereof the freighters or merchants are to pay ſo much, *&c.* and ſuch charter-party being a covenant or agreement for that particular voyage, ſhall be conſtrued according to the intention of the parties, and the uſual cuſtom of merchants [c].

[b] H. Black. 48.

[c] 2 Vent. 196. Style 133. 2 Show. 384. Palm. 399. 2 Roll. Abr. 248. pl. 10. Pop. 161.

Special

Special indentures of co-partnerſhip are often executed by merchants, as part-owners of a ſhip[d]; without which ſpecies of partnerſhip, the commerce of this iſland muſt be trifling indeed; for it is by ſuch means that we are enabled to embark in and carry on foreign trade, which renders us, rich, honourable, and great; that gives us a name and eſteem in the world; that makes us maſters of the treaſures of other nations and countries, and begets and maintains our ſhips and ſeamen, the walls and bulwarks of our own iſland.

And this ſpecies of co-partnerſhip is not conſtituted by executing of indentures ſolely, but part-owners of a ſhip may become ſo either by building or purchaſing their veſſels[e], and if the property is diſtributed among ſeveral, the major part of them may let the ſhip out to freight againſt the conſent, though not without the privity of the minor[f].

Part-owners are tenants in common of a ſhip[g]; and both by the common law of this

[d] Vide Paul v. Birch, 2 Atk. 622.

[e] Molloy 313. Beawes 53.

[f] Trin. 9 Will. 3. 1 Ld. Raym. 235.

[g] Molloy 309.

realm,

realm, and the maritime laws, it is provided, that in caſe a ſhip be taken away or the owners diſpoſſeſſed, they may maintain an action of trover and converſion for an 8th, a 16th, or any other part or ſhare of the ſame.

Thus, in an action on the caſe, the plaintiff declared that he was owner of the 16th part of a ſhip, and the defendant owner of another 16th part of the ſame ſhip, and that the defendant fraudulently and deceitfully carried the ſaid ſhip *ad loca tranſmarina*, and diſpoſed of her to his own uſe, by which the plaintiff loſt his 16th part to his damage; and on Not Guilty pleaded, a verdict was found for the plaintiff, but it was afterwards moved in arreſt of judgment, that the action did not lie, for tho' it be found deceptive, yet this did not help it, if the action did not lie on the ſubject matter; and here they are tenants in common of the ſhip, and by *Littleton* [h] between tenants in common there is not any remedy, and there cannot be any fraud between them, becauſe the law ſuppoſes a truſt and confidence betwixt them [i];

[h] Litt. ſ. 323. 1 Inſt. 199. b. 200. a.

[i] Salk. 290. S. P. Salk. 392.

and

and upon theſe reaſons judgment was given *quod querens nil capiat per billam* [k].

Part-owners are not obliged by law to continue their paction or partnerſhip without ſundering; but yet if they will ſunder, the *law marine* requires ſome conſiderations to be performed before they can do ſo. And therefore if the ſhip be newly built and never yet made a voyage, or is newly bought, ſhe ought to be ſubject to one voyage upon the common out-read and hazard, before any of the owners ſhall be heard to ſunder and diſcharge their parts [l]; but by the laws of *England* the owners may, before any ſuch voyage, ſell or tranſmit their right.

Where thirty-ſeven part-owners of a ſhip would ſend her a voyage, but two or three of the other part-owners would not conſent [m]. Upon which the Admiralty took ſtipulation in nature of recognizance of the thirty-ſeven for ſecurity for the ſafe bringing back of the ſhip. And the ſhip being loſt, the two or three part-owners, who oppoſed the voyage libelled upon this ſtipulation againſt the thirty-

[k] Raym. 15. S. P. 1 Levinz 29. 1 Keeble 38. 3 Leon. 228.

[l] Molloy de Jur. Mar. p. 310. ſ. 3.

[m] 1 Ld. Raym. 235. Trin. Term 9 W. 3.

ſeven.

ſeven. Upon which they moved for a prohibition. But it was denied; for *per curiam*, though by the *law of England* two or three part-owners may hinder the others from ſending the ſhip a voyage without their conſent, yet the law of the Admiralty is otherwiſe. Becauſe there, for the encouragement of navigation, the Court of Admiralty will permit the ſhip to make the voyage, upon ſecurity given to bring her back ſafe. For it is reaſonable that the others, who oppoſe the voyage, ſhould have ſome ſecurity for their ſhip. Then if the ſhip be loſt, it is at the peril of the adventurers, and they ſhall be ſuable upon their ſtipulation by the others in the Admiralty court; ſince it is not doubted, but the Admiralty may take ſtipulations.

If one of ſeveral part-owners of a ſhip objects to a voyage the others propoſe making, he may by proceſs out of the Admiralty arreſt the ſhip, and compel the other part-owners to give ſecurity for her ſafe return. *Lambert* v. *Acretree* n. Several part-owners of a ſhip. Some of them were deſirous that the ſhip ſhould go to ſea, and others of them would

n 1 Lord Raym. 223. S. P. Str. 890. Fitzg. 197. 1 Wilſ. 101. Raym. 78. 1 Keb. 38. 1 Lev. 29. Litt. ſ. 323. Co. Litt. 200. a. S. P. Vin. Ab. 338. pl. 12.

not

not conſent. Upon which they procure the ſhip to be arreſted by proceſs out of the Admiralty, and compelled thoſe who intended to ſend the ſhip a voyage, to enter into recognizance in the Admiralty, conditioned that the ſhip ſhould ſafely return. After which the ſhip began a voyage, in which ſhe was loſt. And upon this the perſons, who were bound for the ſafe return of the ſhip, were ſued in the Admiralty. Upon which a motion was made, in the Court of King's Bench, for a prohibition; 1. Becauſe the recognizance not being in nature of a ſtipulation, the Admiralty had not power to compel the party to enter into it. 2. Becauſe this ſuit being in nature of debt upon a recognizance, the Admiralty had not cognizance of it. But the prohibition was denied by the Court (*abſente Holt* Chief Juſtice) becauſe this ſuit is between the part-owners of the ſhip, and the property is admitted; and therefore it is properly conuſable there. 2. If the Admiralty had not power to take ſuch recognizances, all navigation muſt be obſtructed, if one obſtinate part-owner would not conſent, that the ſhip ſhould make a voyage; and *e contra*, it is very reaſonable that he have ſecurity°, that the ſhip

° A ſuit may be maintained in the Admiralty on ſuch ſecurity. Ld. Raym. 235. acc. 6 Mod. 162. 1 Barn. K. B. 415. R. cont. Carth. 26. Comb. 109. Holt 647.

ſhall

ſhall return in ſafety, ſince he does not conſent to the voyage.

By the common law as applied to part-owners, each of them is poſſeſſed *per my et per tout*, (that is) of the whole and every part, and conſequently have a power to enter and detain the ſhip, even though it be in hindrance or obſtruction of a voyage. And this law is recognized by the courſe and uſage of the Admiralty Court, in caſes of diſagreement among part-owners. Nevertheleſs ſuch right cannot exiſt after the other part-owners have given ſecurity according to the courſe of the Admiralty Court.

Thus p if there are ſeveral part-owners of a ſhip, and the major part of them are for ſending her a voyage to ſea, to which the reſt diſagree; whereupon, according to the common uſage in ſuch caſes, the greater number ſuggeſt in the Admiralty Court the diſagreement of their partner, and then according to their uſage there, they order certain perſons to appraiſe the ſhip, who accordingly ſet a value thereon; and then the major part who agreed to the voyage, enter into a recogni-

p Carth. 26. Hard. 473. S. P. 6 Mod. 162. S. P. Vide 6 Mod. 12, 26, 79.

bance, wherein they bind themſelves jointly and ſeverally, to the diſagreeing parties, in a ſum proportionable to their ſhares, according to the value ſet by the appraiſers, to ſecure the ſhares in the ſhip of thoſe who diſagree to the voyage, againſt all adventures; though there can be no ſuit on this agreement or ſtipulation in the Admiralty Court, the contract being made on land, and therefore of temporal conuſance; yet a ſpecial action on the caſe lies for the violation thereof at common law; ſo, that if there be ſeveral part-owners of a ſhip, and ſome of them refuſe to navigate the ſhip, or to ſend her to ſea; thoſe, who are willing, may compel the others in a Court of Admiralty, on giving ſecurity to anſwer for the ſhip in caſe ſhe be loſt; alſo if a partner diſlikes the voyage, but does not expreſsly prohibit it, and the ſhip is loſt in the voyage, he ſhall have no recompence for his part; but if the ſhip return, he ſhall have an account for what is earned, and it ſhall be intended a voyage with his conſent, without an expreſs prohibition proved.

So q, four joint-owners in a ſhip; three will navigate the ſhip, the fourth will not;

q Skin. 230. 2 Chan. Ca. 36.

the courſe is to go into the Admiralty, and there give ſecurity to anſwer for the ſhip if ſhe be loſt, and then they ſhall be diſcharged againſt the other. If one diſlike the voyage, and doth not expreſsly prohibit navigating the ſhip, and the ſhip go the voyage, and is loſt, in ſuch caſe he ſhall not be anſwered his part; but if the ſhip return, he ſhall have an account, for what is earned, and it ſhall be intended a voyage with his conſent, without an expreſs prohibition proved. As if four tenants in common of land, one or more ſtock the land, and manage it, the reſt ſhall have an account of the profits; but if a loſs come, as if the ſheep, &c. die, they ſhall bear a part. *Per North* Lord Keeper.

Part-owners being tenants in common of a ſhip; "If one tenant in common *deſtroys* the "thing held in common, the other may have "trover againſt him for it, for that is a *total* "converſion to his own uſe of what he had "only a part[r]."

So[s], where one part-owner of a ſhip took her, and ſent her on a voyage to the *Weſt-Indies*, where ſhe was loſt, and the other

[r] Co. Litt. 200. a.

[s] Hil. 1 Geo. 1. Bull. N. P. 34.

owners

owners having brought an action for it, Lord *King* left it to the jury, whether, they being tenants in common of the ſhip, this was not a *deſtruction* by the defendant? and the jury found accordingly, and the plaintiff recovered.

But otherwiſe in the caſe of *partners in trade*[t], each has a power ſingly to diſpoſe of the whole partnerſhip effects, and even if one of the partners becomes a bankrupt, yet every act of the ſolvent partner without knowledge of the act of bankruptcy, as in making conſignments or ſales of goods, &c. if done *bonâ fide* and without fraud, is good, ſo that the aſſignees of the bankrupt partner cannot recover by this action the goods ſo diſpoſed of by the other; neither if the ſolvent partner afterwards becomes himſelf a bankrupt, can the aſſignees under the joint commiſſion againſt both, maintain trover againſt the *bonâ fide* vendee or conſignee of the partnerſhip effects.

As to the maſter of a ſhip, he is not to be conſidered a partner, becauſe he hath no property either general or ſpecial by being

[t] Cowp. 445.

conſtituted a maſter, but is one [u], who, for his knowledge in navigation, fidelity, and diſcretion, hath the government of the ſhip committed to his care and management; yet maſters have uſually ſhares or parts in the veſſel [x]. And the law conſiders a maſter upon all occaſions, to be an officer, who muſt render and give an account for the whole charge when once committed to his care and cuſtody; and upon failure, to render ſatisfaction; and therefore if misfortunes happen, either through negligence, wilfulneſs, or ignorance of himſelf, or his mariners, he muſt be reſponſible. And he is eligible by the part-owners, in proportion to their ſhare, and not according to the majority [y].

And in the caſe of *Pitt* v. *Garnie* [z], where a maſter of a ſhip brought an action on the caſe, and declared, that the ſhip was laden with corn in ſuch a harbour, ready to ſail for *Dantzick*; and that the defendant entered and ſeized the ſhip, and detained her, *per quod impeditus et obſtructus fuit in viagio*; and it was held that it well lay; for though the maſter

[u] Hob. 11. Moor 918.

[x] Molloy 322.

[y] Molloy 310. 4 Inſtit. 146. 1 Salk. 10.

has

has not the property of the ſhip, but the owners, and he is only a particular officer, and can only recover for his particular loſs, yet he may bring treſpaſs, as a bailiff of goods may, and then as bailiff he can only declare on his poſſeſſion, which is ſufficient to maintain treſpaſs.

If the maſter of the ſhip takes goods on board for hire, and is robbed in port, he muſt anſwer the damage; otherwiſe it is if he be robbed by pirates on the high ſea, for then the owner muſt be the loſer[a]: for if he undertakes for hire to carry the goods, the common law cannot look upon him in a different aſpect from a common carrier; for he cannot be looked upon as a mere ſervant to the owner, but rather as an officer of the ſhip, and to ſell the *bona peritura*, which is beyond the condition of a ſervant: but the civil law of the Admiralty excuſes the maſter when robbed by pirates, or on loſing the goods by any inevitable accident; for the dangers of the ſea are ſo various and ſo formidable, that a maſter ſhall not be underſtood to undertake againſt them, unleſs it had been included in

[a] 1 Vent. 190, 238. Raym. 220. 3 Keb. 72, 112, 135. 1 Mod. 85. 2 Lev. 69. S. C. More and Shee, 3 Lev. 259. S. C. cited 2 Lord Raym. 918.

the expreſs words of the contract; for where, in a well-ordered ſociety, a man undertakes for the cuſtody of another's property, he ſecures him againſt all loſs; but where a man is bound to encounter dangers, which civil ſociety cannot guard againſt, he muſt not be ſuppoſed to undertake farther than for his care; and by the general cuſtom of commerce, the merchant is the perſon who runs the riſk, and not the maſter of the ſhip; and it is the merchant alſo who makes the gain of the venture.

And, as the maſter himſelf is anſwerable in the foregoing caſes; ſo likewiſe hath it been held, that the owners are liable to the freighters, in reſpect of the freight, for the embezzlements, &c. of the maſter and mariners [b].

But this proving a great diſcouragement to trade, by the 7 *Geo.* 2. *c.* 15. reciting that, Whereas it is of the greateſt conſequence and importance to this kingdom, to promote the increaſe of the number of ſhips and veſſels, and to prevent any diſcouragement to merchants and others from being intereſted and

[b] Carth. 58. 2 Salk. 440. 3 Lev. 258. 3 Mod. 322.

concern-

concerned therein; and whereas it has been held that in many caſes owners of ſhips or veſſels are anſwerable for goods and merchandize ſhipped, or put on board the ſame, although the ſaid goods and merchandize after the ſame have been ſo put on board, ſhould be made away with by the maſters or mariners of the ſaid ſhips or veſſels, without the knowledge or privity of the owner or owners, by means whereof, merchants and others are greatly diſcouraged from adventuring their fortunes, as owners of ſhips or veſſels, which will neceſſarily tend to the prejudice of the trade and navigation of this kingdom; therefore, for aſcertaining and ſettling how far owners of ſhips and veſſels ſhall be anſwerable for any gold, ſilver, diamonds, jewels, precious ſtones, or other goods or merchandize which ſhall be made away with by the maſter or mariners, without the privity of the owners thereof, it is enacted, "That no perſon or "perſons who is, are or ſhall be owner or "owners of any ſhip or veſſel, ſhall be ſubject "or liable to anſwer for, or make good to "any one or more perſon or perſons, any loſs "or damage by reaſon of any embezzle-"ment, ſecreting or making away with, (by "the maſter or mariners, or any of them) of "any gold, ſilver, diamonds, jewels, precious

" ſtones, or other goods or merchandize,
" which from and after the 24th of *June*,
" 1734, ſhall be ſhipped, taken in, or put on
" board any ſhip or veſſel, or for any act,
" matter or thing, damage or forfeiture done,
" occaſioned or incurred from and after the ſaid
" 24th day of *June*, 1734, by the ſaid maſter
" or mariners, or any of them, without the
" privity and knowledge of ſuch owner or
" owners, further than the value of the ſhip or
" veſſel, with all her appurtenances, and the
" full amount of the freight, due or to grow
" due, for and during the voyage wherein
" ſuch embezzlement, ſecreting or making
" away with, as aforeſaid, or other malverſa-
" tion of the maſter or mariners, ſhall be
" made, committed or done; any law, &c."
And *ſect.* 2. it is further enacted, " That if
" ſeveral freighters or proprietors of any ſuch
" gold, ſilver, diamonds, jewels, precious
" ſtones, or other goods or merchandize, ſhall
" ſuffer any loſs or damage by any of the
" means aforeſaid, in the ſame voyage, and
" the value of the ſhip or veſſel with all her
" appurtenances, and the amount of the
" freight, due or to grow due, during ſuch
" voyage, ſhall not be ſufficient to make full
" compenſation to all and every of them,
" then ſuch freighters or proprietors ſhall re-

" ceive

" ceive their ſatisfaction thereout in average,
" in proportion to their reſpective loſſes or
" damages; and in every ſuch caſe it ſhall
" and may be lawful to and for ſuch freight-
" ers or proprietors, or any of them, in be-
" half of himſelf, and all other ſuch freighters
" or proprietors, or to or for the owners of
" ſuch ſhip or veſſel, or any of them, on be-
" half of himſelf, and all the other part-
" owners of ſuch ſhip or veſſel, to exhibit a
" bill in any court of equity for a diſcovery
" of the total amount of ſuch loſſes or da-
" mages, and alſo of the value of ſuch ſhip or
" veſſel, appurtenances and freight, and for
" an equal diſtribution and payment thereof
" amongſt ſuch freighters or proprietors, in
" proportion to their reſpective loſſes or da-
" mages, according to the rules of equity."

" Provided, *ſect.* 3. that if any ſuch bill ſhall
" be exhibited by or on the behalf of the
" part-owners of ſuch ſhip, the plaintiff or
" plaintiffs ſhall annex an affidavit to ſuch
" bill or bills, that he or they do not collude
" with any of the defendants thereto; and
" ſhall thereby offer to pay the value of ſuch
" ſhip or veſſel, appurtenances and freight,
" as ſuch court ſhall direct; and ſuch court
" ſhall thereupon take ſuch method for aſ-
" certaining

" certaining ſuch value, as to them ſhall ſeem " juſt; and ſhall direct the payment thereof " in like manner, as is now uſed and practiſed " in caſes of bills of interpleader. Provided " alſo, *ſect.* 3. that nothing in this preſent " act contained ſhall extend, or be conſtrued " to extend to impeach, leſſen or diſcharge " any remedy which any perſon or perſons " now hath, or ſhall or may hereafter have, " againſt all, every, or any the maſter and " mariners of ſuch ſhip or veſſel, for or in " reſpect of any embezzlement, ſecreting or " making away with any gold, ſilver, dia- " monds, jewels, precious ſtones, or mer- " chandize ſhipped, or loaded on board ſuch " ſhip or veſſel, or on account of any fraud, " abuſe or malverſation of and in ſuch " maſters and mariners reſpectively, but that " it ſhall and may be lawful to and for every " perſon or perſons, ſo injured or damaged, " to purſue and take ſuch remedy for the " ſame, againſt the ſaid maſter and mariners " reſpectively, as he or they might have done " before the making of this act."

Under which ſtatute it has been decided that where a large quantity of dollars had been ſhipped on board, and while the ſhip lay at anchor ſhe was boarded by a number of

of freſh-water pirates, who robbed her of the dollars; that, as the object of the ſtatute was to protect the owners from all treachery of the maſter and mariners, and at the ſame time to ſubject them as far *as they* truſted the maſter and mariners; that it was neceſſary to prove the colluſion or aſſiſtance of either the maſter or mariners; therefore in this caſe, it being proved, that one of the ſailors had given information to the robbers when the dollars were brought a-board, and got a ſhare of them, that that ſatisfied the ſtatute.

Thus, in the caſe of *Sutton* and *Mitchel*[c], which was in the nature of an action againſt a common carrier, and it was brought to recover the value of a large quantity of dollars, ſhipped by the plaintiff, on board the ſhip *Elbe*, bound from *London* to *Hamburgh*, in the month of *October* 1784, which during the night, were taken by force from on board the ſhip by a number of freſh-water pirates, as ſhe lay at anchor in the *Thames*. At the trial at *Guildhall*, at the Sittings after *Trinity* term laſt, before Lord *Mansfield*, the defendant's counſel reſted his defence upon the firſt part of the firſt ſection of the 7 *Geo.* II. *c.* 15. which enacts, that no perſon or perſons, who

[c] 1 Term Rep. 18.

is,

is, are, or ſhall be, owner or owners of any ſhip or veſſel, ſhall be ſubject or liable to anſwer for, or make good to any one perſon or perſons, any loſs or damage by reaſon of any embezzlement, ſecreting, or making away with, by the maſter or mariners, or any of them, of any gold, ſilver, diamonds, jewels, precious ſtones, or other goods or merchandize, which from and after the 24th of *June* 1734, ſhall be ſhipped, taken in, or put on board any ſhip or veſſel, beyond the value of the ſhip and freight. And evidence was offered to prove, that one of the mariners was acceſſary in the robbery by giving intelligence. But Lord *Mansfield* was then of opinion, that the word embezzlement was not broad enough to cover this tranſaction, and therefore he directed the jury to find for the plaintiff to the whole amount of the dollars. The motion for a new trial, by *Mingay*, was founded on the latter part of the ſame ſection in the Act, the words of which are more general, and comprehend any act, matter, or thing, damage, or forfeiture done, occaſioned, or incurred, from and after the ſaid 24th of *June* 1734, by the ſaid maſter or mariners, or any of them, without the privity or knowledge of ſuch owner or owners, further than the value of the ſhip or veſſel,

veſſel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage, &c. *Bearcroft*, *Lee*, and *Baldwin*, for the plaintiff, took notice that this motion was founded on an affidavit that one of the mariners had informed one of the robbers, that if he would give him a ſhare, he would inform him of the day on which the money was to be ſent on board, and where it was placed, and that the ſame mariner afterwards ſhared the ſpoil. There is no doubt but that the owners of a ſhip are liable for the full amount of every loſs by robbery; and the only queſtion here is upon the 7 *Geo.* II. which ſays, that the owners ſhall not be liable for more than the value of the ſhip and freight, in any caſe of embezzlement by the maſter or mariners; but in order to exculpate the owner, it ſhould appear that one of the mariners was actually concerned in the robbery. Now, does this motion ſtate a caſe in which he could be proſecuted as a party: for it does not follow that becauſe one tells another where a treaſure is to be found, that a felony muſt be committed: and if he is to be taken as one of the actors in point of law, the conſequence muſt be, he is guilty of felony, and then you muſt ſhew that he is guilty of felony on the affidavits.

vits. Here he does not appear to be a principal in the robbery; he is only an acceſſary after the fact, by receiving part of the goods ſtolen. As to the word "occaſioned", it relates only to forfeiture. The words of the Act exclude all idea of force: but this is expreſsly admitted to have been done by force. And it is laid down by *Foſter*, that a perſon who is charged with privately ſtealing muſt be acquitted, if there be any evidence of force being uſed. *Mingay*, in ſupport of the rule, relied upon the latter part of the ſection above mentioned. Lord *Mansfield*, Ch. J.—The act of Parliament is certainly large enough to take in this matter. I decided it before on the firſt part of the ſection: the latter part was not relied on, or even mentioned at the trial. *Willes* and *Aſhhurſt*, Juſtices, concurred. *Buller*, J.—This act is as ſtrong as poſſible, and was meant to protect the owner againſt all treachery in the maſter or mariners, as appears from the clauſe in queſtion as well as the preamble of the act. It meant to relieve the owners of ſhips from hardſhips, and to encourage them; at the ſame time ſaying, that ſo far as you have truſted the maſter and mariners yourſelf, ſo far you ſhall be anſwerable; which is to the value of the ſhip and freight. This man is an

an acceſſary both before and after the fact: If the argument for the plaintiff holds it would confine it to the act of the mariner only: but ſuppoſe a mariner combined with three or four other perſons, there could be no doubt but that that would come within the proviſion of the ſtatute.

Rule made abſolute [d].

And for ſuch general charges againſt the ſhip, the owners are ſpecifically liable.

Thus, in the caſe of *Pariſh* v. *Crawford* [e], where the defendant was ſole owner of a ſhip, which he let to *Fletcher* for a voyage at a certain ſum, and *Fletcher* was to have the benefit of carrying the goods. The plaintiff had ſhipped a quantity of moidores, and the bills of lading were ſigned by the captain; the moidores being loſt, an action was brought againſt the defendant, as owner, to charge him under the ſtat. 7 *Geo.* II. to the amount of the ſhip and freight. For the defendant it was inſiſted, that *Fletcher* was owner to this purpoſe, and that he ſhould be ſued; but it

[d] N. B. The rule was made abſolute on payment of coſts, becauſe this motion was made on a new ground, not opened before on the trial.

[e] 2 Stra. 1251.

appear-

appearing that the defendant had covenanted for the condition of the ſhip and behaviour of the maſter, it was ruled, that he was liable, for *Fletcher* had only the uſe, but he had the ownerſhip, and that the freight he had from *Fletcher* was ſufficient to charge him.

And if a maſter of a ſhip buys proviſions for the ſhip, and has money from the owners to pay for the proviſions, but fails without paying the money; the owners are liable to pay in proportion to their reſpective ſhares in the ſhip. For, as for this purpoſe, the maſter muſt be conſidered as the mere ſervant to the owners.

So where *Gallway* [f], as maſter of the ſhip of which other defendants were part-owners, bought ſeveral goods of the plaintiffs; as beef, biſcuit, ſails, and cordage; *Gallway* the maſter failed. The bill was to compel the defendants, the part-owners, to pay; who inſiſted, that *Gallway* only was liable; and beſides that he had money from the owners to pay the plaintiffs. *Per Cur.* *Gallway* the maſter was but a ſervant to the owners; and where a ſervant buys, the maſter is liable.

[f] 2 Vern. 643.

If

If the owners paid their ſervant, yet if he paid not the creditors, they muſt ſtand liable: and decreed the owners to pay the plaintiffs their debts in proportion to their reſpective ſhares and intereſts in the ſhip.

Special partnerſhip may alſo be contracted under a charter-party, and all the parties ſo covenanting become liable [g] in a given extent, as partners according to the law-merchant.

A charty-party is an old inſtrument, inaccurate and informal, and, by the introduction of different clauſes, at different times, it is alſo ſometimes contradictory; but, like all mercantile contracts, it ought to have a liberal interpretation. *Per* Lord *Mansfield* [h], in the caſe of *Hotham* and the *Eaſt-India Company*.

The charter-party ſettles the agreement as the bills of lading do the contents of the cargo. (There are three bills of lading generally made, one to be ſent over ſea to him whom the goods are conſigned to, another for the maſter, and the third for the mer-

[g] Molloy 366.

[h] Dougl. 277.

chant or lader), and binds the master to deliver them well conditioned, at the place of discharge, according to the agreement; and for the performance, the master or the owner obliges himself, ship, tackle, and furniture[i]. And the parties are either owners of ships on the one part, and merchants on the other; or masters of ships invested by the owners with power to enter into charter-parties, and merchants.

Charter-parties, says *Molloy*, "have always by the common law had a genuine construction, as near as may be, and according to the intention and design, and not according to the literal sense of traders, or those who merchandize by sea;" yet they must be regulary pleaded, that is, in case of litigation, there must be a narration of facts in a legal form, in order to facilitate the determination of a Court upon such agreements according to the intention of the parties, and the nature of the contract; and such appears to have been the construction which led the judgment of the Court in deciding upon the question of *ship-damage* under a charter-party of freightment between *Hotham and two Others* against the *East-India Company*[k]. In this case,

[i] Molloy 365.

[k] Dougl. 272.

the

the ſhip *York*, of which two of the plaintiffs were part-owners, and the third captain, had been freighted by a charter-party between them and the *Eaſt-India* Company, on a voyage from *London* to *India*, and back to *London*[1]. On her return home, ſhe met with a moſt uncommonly violent ſtorm, off *Margate*, where ſhe was ſtranded, on the firſt of *January* 1779, and ſunk under water. By this misfortune, a great part of her cargo (being ſalt-petre) was loſt; the principal part of what remained, which conſiſted chiefly of pepper, was greatly damaged by the ſea-water, but was got out of the ſhip, by perſons ſent down by the Company, and brought to town in other veſſels, where a particular proceſs was employed, at a great expence to the Company, to reſtore it, in ſome degree, and render it marketable. The ſhip, after being in a great meaſure unloaded, was with much difficulty, raiſed out of the water, and arrived in the port of *London*, with a ſmall part of the cargo ſtill remaining on board. The plaintiffs inſiſted, that ſhe had arrived at her port of diſcharge, and had performed her voyage within the meaning of the charter party, and that, notwithſtanding the miſ-

[1] Dougl. 272. 18th November 1779.

fortune which had happened, and the loss of part, and the damage done to the rest, of the cargo, they were entitled to be paid the freight of the goods saved, and the demurrage. The defendants contended, first, that in the events which had happened, they were discharged from the payment of any freight or demurrage; secondly, that if they were liable for freight and demurrage, yet by certain clauses in the charter-party, they were entitled to deduct therefrom the value of the goods lost; the loss upon those which were saved in a damaged state; and the expences they had been put to in getting those damaged goods to *London* and rendering them marketable. A common action of covenant was at first brought on the charty-party, to which the defendants pleaded; but afterwards both parties consented to try the questions in dispute between them in four different feigned issues, which were as follows: 1. Whether the plaintiffs were, or were not, entitled to any and what freight or demurrage in respect of the ship and voyage, in the charter-party mentioned; 2. Whether the plaintiffs were liable to pay or allow to the defendants any sum or sums of money in respect of the goods and merchandizes which had been shipped on board the said ship, and which had been lost,

or not delivered to the defendants on her arrival in *England*; 3. Whether the plaintiffs were liable to pay or allow, &c. in reſpect of a certain quantity of pepper which had been ſhipped, &c. and which had been prejudiced, wet, and damnified, before the arrival of the ſhip at *London*; 4. Whether the plaintiffs ought to pay or make ſatisfaction to the defendants, for the expences they were at, in ſaving and bringing to *London* certain goods and merchandizes which were taken out of the ſhip when ſhe was ſtranded, or otherwiſe concerning the ſaid goods; theſe iſſues came on to be tried, before Lord *Mansfield*, at *Guildhall*, at the Sittings after laſt *Trinity* term. There were two clauſes in the charty-party on which the defence on the firſt iſſue was founded, *viz.* 1. "And, as touching the freight to be paid or allowed by the Company, it is agreed, and the Company covenant with the ſaid part-owners, that the Company ſhall, and will, in caſe and upon condition that the ſhip performs her voyage, and arrives at *London* in ſafety, and the ſaid part-owners and maſters do perform the covenants on their part, and not otherwiſe, well and truly pay and allow the freight herein mentioned [m]. 2. It is

[m] P. 8. of the printed form of the Eaſt-India Company's Charter-parties.

hereby agreed, that, in caſe the ſhip does not arrive in ſafety in the river *Thames*, and there make a right delivery of the whole and entire cargo and lading on board the ſaid ſhip as aforeſaid, the Company ſhall not be liable to pay any of the ſums of money herein before agreed to be paid for freight and demurrage, nor ſubject to any demands of the ſaid part-owners or maſter on account of the ſaid ſhip's earnings in freight, voyages for the Company, or on account of any other employment, any other law, uſage, practice or cuſtom, notwithſtanding [n]. The following clauſe was the foundation of the defence on the ſecond iſſue. And, if any of the homeward-bound cargo ſhall be loſt or undelivered into the ſaid Company's warehouſes at the ſaid ſhip's arrival in *England*, (except that no ſuch payment ſhall be made if there happens an utter inevitable loſs of ſhip and cargo, nor ſhall any other payment be made for ſuch goods as ſhall neceſſarily periſh or be caſt into the ſea for the preſervation of the ſhip and cargo, than by an average to be borne by ſhip, freight, demurrage, and cargo,) the part-owners and maſter, ſhall pay or allow to the Company the prime coſt of ſuch goods, and 30*l.* for every 100*l.* on

[n] P. 11. of the printed form of the Eaſt-India Company's Charter-parties.

ſuch

ſuch prime coſt o. On the third iſſue they relied on the following clauſes: 1. But if any of the homeward-bound cargo, when delivered into the Company's warehouſes in *England*, ſhall be found to be prejudiced, wet, or damnified, by any occaſion or accident whatſoever, it ſhall be lawful for the Company to refuſe ſuch goods, and in ſuch caſe the part-owners and maſter ſhall take them, and allow to the Company the ſums which they are invoiced at, with charges, cuſtoms, and duties; and in ſuch caſe the Company ſhall pay no charges or freight for the ſaid goods ſo prejudiced, wet, or damnified, unleſs in caſes of damaged pepper, which the part-owners and maſter are to allow the Company for at the current price of ſound pepper in *London*, and the Company are to pay the freight and charges on ſuch pepper as if it were not damnified P. 2. But the ſaid part-owners ſhall not be charged with any ſum of money in reſpect of goods damaged on board the ſaid ſhip, but ſuch as ſhall, by the condition and appearance of the package thereof, or by ſome other reaſonable proof, appear to be ſhip-damage; any thing

o P. 4, 5, of the printed form of the Eaſt-India Company's Charter-parties.

P Ibid. p. 4, 5.

herein contained to the contrary thereof in any wiſe notwithſtanding [q]." 3. A proviſion for paying demurrage to the owners, if the ſhip ſhould be diſpatched ſafe from the *Malabar* coaſt, and ſhould not make the paſſage in a limited time; and which adds, "and the owners ſhall not be reſponſible for any damage that may happen to the homeward-bound cargo, occaſioned by ſuch late diſpatch [r]."

The jury having found for the plaintiffs on the three firſt iſſues, *viz.* 1. That freight was to be paid for all the Company's goods delivered, and demurrage, as ſpecified in the charter-party: 2. That the plaintiffs were not liable to pay for any goods loſt, or not delivered: 3. That they were not liable to pay or allow for any loſs on the pepper, and for the defendants on the coſt, (*viz.* That the plaintiffs were to pay to the defendants their proportion of the expences in ſaving the goods and merchandizes, by way of general average, as ſpecified in the charter-party, and the whole extra expence of bringing the

[q] P. 13. of the printed form of the Eaſt-India Company's charter-parties.

[r] Ibid. p. 14.

goods

goods from *Margate)*, a rule was obtained by the defendants to ſhew cauſe why there ſhould not be a new trial on all the iſſues found againſt them; and the caſe was argued this day, by *Lee*, *Davenport*, *Baldwin*, and *Erſkine*, for the plaintiffs, and the Solicitor-General and *Dunning*, for the defendants. The counſel for the defendants relied, as to the freight and demurrage, on the ſtrict terms of the inſtrument, by which it was ſtipulated, that neither ſhould be paid for, unleſs the ſhip ſhould arrive in ſafety in the river *Thames*, and there make a right delivery of the whole and entire cargo. If the plaintiffs had proceeded in covenant, ſuch an arrival and ſuch a delivery muſt have been averred, and was now neceſſary to have been proved, to make out the caſe on the part of the plaintiffs. In a court of law, the ſtipulations of the deed muſt appear to have been exactly complied with; and, if any relaxation was to be allowed, on principles of equity, recourſe muſt be had to a court of equity. The ſame reaſoning was equally applicable to the ſecond iſſue. On the third, they inſiſted, that "ſhip damage" was ſynonimous to "ſea damage," and meant, damage happening at ſea, in contradiſtinction to any injury the goods might have received before they were put on board, not

not merely damage at ſea occaſioned by inſufficiency in the ſhip, or the miſconduct or negligence of the maſter or mariners, which was the interpretation contended for on the part of the plaintiffs. Without any ſtipulation, the owners and maſter would have been anſwerable to the Company for loſſes ariſing from thoſe cauſes. The word "ſhip damage," it is true, was meant to controul the general words in a preceding part of the inſtrument, by virtue of which the plaintiffs would otherwiſe have been liable, if the goods had been prejudiced or damnified by any occaſion or accident of any ſort; but, according to the conſtruction contended for by the plaintiffs, this prior clauſe would be totally annulled by the other.

The ſaving in caſe of a late departure from the *Malabar* coaſt, affords an additional proof that ſea-hazards from weather, ſtorm, &c. were meant. For how could a detention beyond the uſual ſeaſon increaſe the danger of damage from inſufficiency in the veſſel (independent of what the weather might occaſion) or from miſconduct in the maſter or the crew? On the other ſide, it was inſiſted, that this ſort of inſtrument ought to receive a liberal conſtruction. The non-compliance with

with the letter of it, in not delivering the cargo in the river *Thames*, was owing to the act of the defendants themſelves, in ſending their ſervants on board, who took it out of the ſhip without any participation with the plaintiffs. This diſcharged them from the neceſſity of performing ſtrictly that part of the contract (as to which the caſe of *Sparrow* v. *Caruthers*, reported in *Strange*[s], was in point), and the diſcharge might have been averred in an action of covenant. That as to the goods damaged or loſt, the charter-party was certainly very confuſed and ill digeſted, full of contradictions, owing to the circumſtance of different clauſes having been added at different times, without attention to the coherence and conſiſtency of the whole. But it muſt be interpreted in a manner the moſt conſiſtent with good ſenſe, and the nature and general tendency of the whole contract. The expreſſion of "ſhip damage" could not be uſed in oppoſition to damage received before the goods are put on board, becauſe the owners could never be anſwerable for that ſort of injury, and therefore it never could have been thought neceſſary to introduce words to declare that they were not.

[s] T. 18 Geo. 2. Str. 1236.

It

It was ſaid, that the clauſe mentioning ſhip damage was firſt introduced 1759, when the *Ilcheſter Eaſt-India-Man* was loſt. The then *Solicitor General* had given an opinion, that the charter-party, as it then ſtood, would make the owners liable for loſſes by ſtorms, and with the expreſs deſign of preventing that conſtruction, this new clauſe was adopted.

It muſt mean damage received on board the ſhip, and occaſioned by negligence or miſconduct; ſurely not damage ariſing, as in the preſent caſe, from the act of God, which no human care could prevent.

If there were any doubt, the ſpecial jury who had exerciſed their judgment upon it were certainly moſt competent to determine it, no queſtion being more excluſively fit for their conſideration. The owners therefore were by that clauſe exempted from reſponſibility for any other ſort of damage but ſhip-damage ſo underſtood, and the foregoing words "by any accident whatſoever," were thereby controuled and reſtrained. Then, as to the goods loſt, this being the clear meaning of ſhip-damage, and univerſally ſo underſtood by perſons converſant with the ſubject, it could never be the intention of the contract,

contract, that, though the owners were not to be anſwerable for goods damaged, they were for goods loſt, by the act of God. The ſtrict compliance with the words on which the defendants relied as to the goods loſt, was never expected. The cargoes of *Indiamen* are never delivered into the Company's warehouſes, but only into lighters belonging to the Company. *Edwin* v. the *Eaſt-India* Company [t], and *Edwards* v. *Child* [u], were cited.

Lord *Mansfield*. I have no doubt, but that, if the delivery at *Margate* was, in the contemplation of the parties, ſubſtituted for a delivery at *London*, it might have been averred in an action of covenant [v], becauſe there can be no material fact in a cauſe which may not be put upon record, or given in evidence on the general iſſue. The Company are not liable to any imputation. The part they took, when the calamity happened, was what humanity and juſtice required, and can be of no prejudice to either ſide. The charter-party is an old inſtrument, informal, and, by the introduction of different clauſes, at different times, inaccurate, and ſometimes contra-

[t] Canc. H. 1690. 2 Vern. 210.

[u] Canc. M. 1716. 2 Vern. 727.

[v] Vide Jones v. Barkley, Dougl. 684.

dictory.

dictory. Like all mercantile contracts, it ought to have a liberal interpretation. In conſtruing agreements, I know no difference between a court of law and a court of equity. In the caſe of *Edwin* v. the *Eaſt-India* Company, *Vernon* makes the court ſay, "Though the charter-party is ſo penned, that nothing can be recovered at law, yet the plaintiffs have a juſt demand, and ought to be relieved in equity."

A court of equity cannot make an agreement for the parties; it can only explain what their true meaning was; and that is alſo the duty of a court of law. I told the jury, that the inſtrument muſt have a liberal conſtruction, according to the true intention, and I left the conſtruction to them more than in common caſes ought to be done, becauſe the province of conſtruing written inſtruments belongs to the Court. On the point of ſhip-damage I had conſiderable doubts, which I ſtated fully to the jury. The Company have thought fit to bring the caſe before the Court, but, upon hearing the arguments, I am now clear that the verdict was right on all the iſſues. As to the firſt, the Company, by receiving part of the cargo, have waved all objections concerning the delivery. (His Lordſhip

ſhip had interrupted the defendant's counſel to aſk, whether the Company could mean ſeriouſly to inſiſt, that they were to have the uſe of the ſhip, and the goods which had been delivered, and not pay for the freight of them?)

The principal queſtion is, whether the owners are to pay for the damage occaſioned by the ſtorm—the act of God; and this muſt be determined by the intention of the parties, and the nature of the contract. It is a charter of freight. The owners let their ſhips to hire, and there never was an idea that they inſure the cargo againſt the perils of the ſea. The Company ſtand their own inſurers. Words muſt be conſtrued according to the ſubject matter. What are the obligations upon the owners which ariſe out of the fair conſtruction of the charter-party; why, that they ſhall be anſwerable for damage incurred by their own fault, or that of their ſervants, as from defects in the ſhip, or improper ſtowage; ſuch as mixing commodities together which hurt one another, &c. If they were liable for damages occaſioned by ſtorms, they would become inſurers, not freighters. Many of the difficulties which have been raiſed, are occaſioned by the multiplicity of unneceſſary words, introduced with a view to be more expli-

explicit; an effect which often ariſes from the ſame cauſe in acts of Parliament. It ſeems the queſtion had occurred in the year 1759, and the clauſe mentioning ſhip-damage was introduced in order to fix the riſks for which the owners were to be anſwerable. That clauſe rides over all the former part of the charter-party. As to the other point of the goods loſt, the whole is one entire contract, and muſt be underſtood in a manner conſiſtent with itſelf; and it never could be intended, that the owners ſhould be protected from the leſſer loſs, and remain anſwerable for the greater.

Willes Juſtice, abſent.

Aſhhurſt Juſtice.—I am of the ſame opinion. The conſideration, that the owners are not inſurers, controuls every branch of the inſtrument. If the proviſo concerning ſhip-damage had been wanting, there might have been ſome doubt; as the caſe ſtands there is none.

Buller Juſtice.—I am of the ſame opinion. There could have been no doubt on the ſubject of the firſt iſſue, if the parties had gone on in the uſual way, by an action of

of covenant on the charter-party. If an act undertaken to be done is diſpenſed with by the other party it is ſufficient ſo to ſtate it on the record; ſpecial pleading being nothing but a bare narration of facts in a legal form.

The rule diſcharged.

CHAPTER VI.

Partnership—
Entering into.

PARTNERSHIP cannot be entered into or contracted without the consent [a] of all the partners, who ought reciprocally to choose and approve of one another, in order to form among themselves that sort of tie, which is aptly described as a kind of brotherhood [b].

The free choice of the persons contracting is so essentially necessary to the constituting of a partnership, that even the executors and representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners [c].

In the very formation of a partnership contract such attention and care is exacted from each partner, as every prudent man takes of

[a] Consent is necessary to complete every contract. 4 Burr. 2241.

[b] *Societas jus quodammodo fraternitatis in se habet.* Dig. l. 63. ff. pro. soc.

[c] *Nec hæres socii succedit.* l. 65. § 9. pro. soc. b. 2 Vez. 33.

his

his own concerns, which is certainly a good mode of enſuring the ſhare contributed by each partner, and affords the ready means to ſecure good fellowſhip, and to promote that enterprizing ſpirit which is ſo eminently uſeful for the encouragement of our trade and commerce with other nations. And with no ſmall ſhare of truth might it be obſerved, with reference to our iſland and its inhabitants, that the philoſopher may arrive at an high pitch of improvement in agriculture, arts, and ſciences; the huſbandman, the artizan, and the manufacturer, may reduce ſuch ſpeculative knowledge to practical uſes, with the greateſt ſkill and dexterity on their parts; Government itſelf may enact the wiſeſt laws, and give all deſirable encouragement for the advancement of commerce; yet what can even all this avail, without the penetration and ſagacity of our merchants, and traders, to export the produce of our lands, and the labors of our artiſts and manufacturers into foreign countries, with advantage to the State, as well as to themſelves? It is obſerved by *Molloy*, "That foreign trade is the "main ſheet-anchor of us iſlanders; without "which, the genius of all our uſeful ſtudies "and the which renders men famous and "renowned, would make them uſeleſs and

"inſignificant to the public." And Lord Chancellor *Bacon* obſerves, that "MERCHANTS AND TRADERS ARE IN A STATE, WHAT THE BLOOD IS TO THE BODY." The enterpriſe, abilities and ingenuity of this part of the community are therefore moſt certainly of the utmoſt importance to the whole *Britiſh* empire. From ſuch conſiderations as theſe, there naturally ariſes the idea of propagating, by the beſt poſſible means, that ſpecies of commerce, which makes us maſters of the treaſures of other nations and countries, and which begets and maintains our ſeamen.

And perhaps there cannot be a more ready method to propagate commerce of ſuch a nature, than by uniting the joint efforts of ſkilful and enterprizing merchants in co-partnerſhip; which has already been ſhewn to conſiſt in joining together the intereſts of two or more merchants or traders for the purpoſe of advancing and improving commerce. And upon entering into partnerſhip, the ſubject of which comprizes the capital ſtock, and the intereſt of each partner therein; together with the labor and ſkill to be employed, and the diviſion thereof; what naturally occurs in point of diſtribution ſeems to be, that if each partner contributes an equal proportion of capital ſtock,

ſtock, labor, and ſkill, then each muſt receive an equal ſhare in the profit and loſs; but where they contribute unequally, certain rules ſhould be preſcribed according to the circumſtances of the partnerſhip, for the purpoſe of adjuſting the reſpective ſhares of all the partners.

For inſtance, if one partner furniſhes labor, and the other money, whatever the produce of ſuch partnerſhip trade may amount to, it ſhould ſeem right to divide it, after deducting the ſum advanced, in the proportion of the intereſt of the money to the wages of the labor, allowing ſuch a rate of intereſt as money might be borrowed for upon the ſame ſpecies of ſecurity, and ſuch wages or allowance as a ſkilful workman would be entitled to for the ſame degree of labor and a ſimilar truſt.

According to the principle laid down in the civil law, which ſays, [d] that no man doubts, but that partnerſhip may be entered into by two perſons, when one of them only finds money, in as much as it often happens,

[d] Inſtit. lib. 3. tit. 26. De Societat. § 2.

"*Nam et ita coiri poſſe ſocietatem non dubitamus, ut* "*alter pecuniam conferat, alter non conferat, et tamen lucrum* "*inter eos commune ſit; quia ſæpe opera alicujus pro pecunia* "*valet.*"

that the work and labor of the other amounts to the value of it and ſupplies its place.

For in partnerſhips where on the one ſide labor is contributed and on the other only the *uſe* of money, that partner who contributed the money does not always admit the other to a ſhare of the principal; but only to his ſhare of the profit, which ſuch labor and money joined together might produce. And if *A.* for inſtance, who furniſhes labor only hath no title to any part of the money advanced upon diſſolving the partnerſhip, ſo *B.* alone ſhould be liable to the riſk of the money as owner thereof; for in ſuch a caſe it is not the money itſelf but the riſk which it runs, and the probable gain which may accrue from it, that are to be compared with the labor.

Therefore when the profits of ſuch a partnerſhip are to be ſhared, it would be out of all proportion in point of reciprocal advantage if the labor were to be compared with the principal ſum advanced; and the only fair criterion to judge by, is a true compariſon between the value of the labor on one ſide, and the riſk and hazard which the money advanced is expoſed to on the other. And perhaps the better

better way in forming partnerſhips of this ſort is to rate the riſk of the principal and the hopes of the profit according to the intereſt that is generally given for money ſo borrowed upon riſk. Suppoſing then this intereſt to be 6 *l. per cent.* if one party contributes labor worth 60 *l.* and the other advances 1000 *l.* in money, each partner will ſhare equally of the profit. According to this rule, if there ſhould be nothing gained by the partnerſhip concern, *A.* would loſe his labor, and *B.* his intereſt, which would be equal and juſt. And ſhould the original ſtock be diminiſhed, by the ſame rule *A.* loſes only his labor, whereas *B.* would loſe his intereſt and a part of the principal, for which eventual diſadvantage *B.* is compenſated by having the intereſt of his money computed at *ſix pounds per cent.* in the diviſion of the profits, where there are any.

But it ſometimes happens in partnerſhip concerns, that labor and money are ſo blended or interwoven together, as to give to him that contributed only his labor, a ſhare in the principal; the labor contributed by one partner, and the money advanced by the other, being ſo intermixed as to make one general maſs. As for example, one partner

ſpends the money advanced by him in buying up unwrought materials, and the other furniſhes perſonal ſkill and labor to work them up and manage them, which very often happens in large manufacturing towns. Thus, again, if I ſupply a weaver with 100 *l.* to buy wool, and he makes cloth of it; computing his labor at 100 *l.* it is manifeſt that here both of us have an equal intereſt in the cloth; and when it is ſold, the money muſt be equally divided: Nor in fairneſs could I deduct the 100 *l.* contributed at firſt, and then divide the remainder with him.

This rule[e] obtains in other things as well as money, as when one allows ground for a building, on condition that he who builds thereon ſhall have a moiety: or, as when one truſts a flock to be fed, on condition that if it be ſold within a limited time, the money ſhall be proportionably divided amongſt the partners[f].

But, in order to prevent litigation and ſtrife between partners, the diviſion of the profit ought never to be forgotten in the conſtitution of the partnerſhip, and it is there-

e Digeſt. lib. 19. tit. 5.

f Grotius, l. 2. c. 12. ſ. 24.

fore

fore commonly ſettled, in a regular partnerſhip, by expreſs agreements: yet theſe agreements, to be equitable, ſhould purſue the principle of the rule here laid down, whenever ſuch partnerſhip is to be entered into.

And upon entering into partnerſhips which are mixt in their nature, by one partner's contributing the whole of the money, and another labour and ſkill, perhaps the moſt convenient form of arrangement might be to divide the whole concern into a certain number of *aliquot* parts or portions, and to aſſign to each partner reſpectively his agreed number of ſhares, by which his proportion of the profit or loſs is to be regulated. For it ſhould be conſidered upon every occaſion where money is ſo advanced for the purpoſe of entering into partnerſhip, that all the partners are bound by what any one of them afterwards does in the courſe of the buſineſs; for, *quoad hoc*, each partner is conſidered as an authoriſed agent of the reſt, and all are reſpectively implicated, and each becomes liable to the fulleſt extent in ſuch trade or buſineſs.—Thus in the caſe of *Hubert* and *Nelſon*, where a gentleman engaged in trade, but did not appear in the partnerſhip g.

g 26th Oct. 1734. Davies's Bankrupt Law, p. 8.

Philip

Philip Hubert, of the pariſh of St. *Anne*, *Weſtminſter*, in the county of *Middleſex*, Eſq; enters into articles of copartnerſhip with *Robert Nelſon*, of *London*, diamond-merchant, in manner following:— The articles recite, That *Hubert* having experience of Mr. *Nelſon*'s fidelity, had agreed to carry on the trade of a diamond-cutter with him for the ſpace of one year, and to be concerned in the profit and loſs of buying, ſelling and retailing of diamonds; and *Hubert*, towards carrying on the trade, agreed to advance and bring into the ſaid trade 500 *l.* *viz.* 100 *l.* for buying of mills and other materials, and 400 *l.* for buying of rough diamonds for their mutual benefit and advantage. And as *Nelſon* was the jeweller, he was in the firſt place to be allowed for cutting and poliſhing every carrot of diamonds 14 *s.* and after ſuch deductions the half of the profit and loſs was to be divided and ſuſtained between them. And *Nelſon* agreed that he would be faithful to *Hubert*, and that a true account of all their dealings ſhould be taken every three months, and for that purpoſe that he (*Nelſon*) would fairly write down all ſuch tranſactions and dealings in ſome convenient book or books of account to be kept by the ſaid *Nelſon*, of which the ſaid *Hubert* ſhould at all times during

during the copartnerſhip have the ſight and peruſal, and the liberty to tranſcribe any part thereof. But it was thereby agreed, That the ſaid *Nelſon* ſhould make ſuch entries and carry on ſuch trade on his own ſeparate account and riſque, and not as a partner of *Hubert*, who was not to be liable to any of the ſaid *Nelſon*'s debts or engagements, ſave as in manner aforeſaid. And it was alſo agreed, that neither of the parties would do any act whereby the ſaid 400 *l.* ſhould be prejudiced or leſſened, nor ſhould ſuch 400 *l.* be charged or affected in any degree, by reaſon or means of any private debt or debts, which then was or ſhould then after grow due from the ſaid *Robert Nelſon* on his own private account; and that the co-partnerſhip ſhould continue for one year, and ſo from year to year for ſeven years, if *Hubert* ſhould require the ſame; and that if *Hubert* ſhould at the end of the firſt year, or any other year during the ſaid ſeven years, be minded or deſirous to call in the ſaid 500 *l.* ſo agreed and thereby underſtood between the parties to be only lent from *Hubert* to *Nelſon*, on the terms aforeſaid, and to end the ſaid partnerſhip; that then the ſaid *Hubert* ſhould give to the ſaid *Nelſon* three months notice before the end of each or any of the ſaid years,

of

of ſuch his mind or deſire, in writing, to be ſigned by the ſaid *Hubert*, and which the ſaid *Nelſon* was thereby bound to obſerve and comply with. And it was farther agreed that *Nelſon* ſhould be allowed all ſuch expences as he ſhould be put to in preparing or finiſhing any commodity belonging to the trade; and that if *Hubert* ſhould during the co-partnerſhip advance any ſum to *Nelſon*, or if *Nelſon* ſhould advance any ſum of money of his own, which both were at liberty to do, that the profit and loſs of ſuch ſum or ſums ſhould be equally borne between them, and that *Nelſon* ſhould not during the co-partnerſhip take any ſum from any other perſon on the terms of the co-partnerſhip, ſo as to intitle any perſon to any profit from the trades or either of them in conjunction with *Nelſon*, without *Hubert*'s leave. And for the performance of theſe articles each bound himſelf to the other in the penalty of 1000 *l.* and on the back of theſe articles there was a memorandum indorſed, that before the execution thereof it was agreed, that if any ſum ſhould be advanced by either of them to carry on their trades, without the like ſum being advanced by the other, that the party ſo advancing ſhould be allowed by the other intereſt for a

moiety

moiety of ſuch money after the rate of 5*l.* *per cent.* After theſe articles were entered into, *Nelſon* being the acting partner and bred a jeweller, carried on the trade from the year 1734, to the year 1738. without making any diſcovery of his partnerſhip to his creditors, except to a few of his moſt intimate friends, and during that time contracted ſome debts in the jewelling trade to perſons who at that time were wholly unacquainted with the co-partnerſhip, and *Nelſon* gave his own ſeparate notes for ſuch debts, without mentioning company or partner. In *October* 1738, *Nelſon* ſhews the articles to ſeveral of the creditors, who ſold him large parcels of diamonds on the credit thereof, and *Nelſon* gave promiſſory notes for himſelf and Company, which were afterwards proved under the commiſſion. *Hubert* finding that *Nelſon* had diſcovered the co-partnerſhip, and that he had given notes for himſelf and Company to a great ſum, applied to *Nelſon* to ſettle with him, and to deliver up the articles; but *Nelſon*'s demands being too high for *Hubert*, on the 20th of *December* 1738, *Hubert*, in order to protect his eſtate from the debts which *Nelſon* had contracted, makes a conveyance of all his real and perſonal eſtate, and then retires to

France.

France. On the 15th of *January* 1738, a joint commiſſion iſſued againſt *Hubert* and *Nelſon*, as partners, and on ſuch joint commiſſion they were declared bankrupts. On the 30th of *January* 1738, *Hubert* preſers a petition to the right honourable the Lord High Chancellor, ſetting forth, that in *October* 1734, he lent *Nelſon* 500*l.* for which he gave him his bond, and that on ſuch bond there was then due to him 380*l.* which he had demanded payment of; and that *Nelſon* not only refuſed him payment, but threatned, that unleſs he would deliver up the bond, and give him 1500*l.* that *Nelſon* would ſwear that *Hubert* was his partner, and that he would contract debts to 10,000*l.* which he would ſubject *Hubert* to pay. That a commiſſion had been awarded againſt *Nelſon*, and a joint commiſſion againſt *Nelſon* and *Hubert* as jewellers and partners, on the petition of one *John Hardham* a diamond cutter, who pretended there was a debt of 1500*l.* due to him from *Nelſon*, which *Hubert* was ſubject to pay. That *Hubert* was poſſeſſed of 1000*l. per annum*, eſtate, and never had any dealings or tranſactions with *Hardham*, or committed any act of bankruptcy. That the 31ſt of *January* was appointed for choice of aſſignees, and that

that the meſſengers under the commiſſion had ſeized a great quantity of plate, which if they ſhould proceed to diſpoſe of, would be a great loſs to him. And therefore *Hubert* prayed, that the joint commiſſion againſt him and *Nelſon* might, as againſt *Hubert*, be ſuperſeded, and that in the mean time all proceedings might thereupon be ſtayed until a writ ſhould iſſue for that purpoſe. The petitioner *Hubert*, in the petition took no notice of the articles of co-partnerſhip which were between him and *Nelſon*; and on the 3d of *February* following this petition came on by ſpecial appointment, and was heard at his Lordſhip's houſe in *Ormond ſtreet*. And upon reading ſeveral affidavits of the petitioner and of *John Hardham*, Sir *Thomas Aſton* and Others, *John Crew* and Others, *Paul Daniel Chevenix*, Dr. *Francis Aſcough*, *Robert Parſons* and Another, *James Cundell* and Another, *Joſeph Emmott* and Others, and *Iſaac Strutt*; the examination of *William Parſons* taken before the commiſſioners, under the ſaid joint commiſſion the 31ſt day of *January* 1738, and the articles of partnerſhip dated the 10th of *October* 1734, between the ſaid *Hubert* and *Nelſon*, and alſo the indorſement on the ſaid articles, and an account marked B. referred to in the depoſition of *William Parſons*, the

ſeveral

ſeveral depoſitions of *John Hardham*, *William Thompſon*, *Paul Whitehead*, *Edward Clarke*, *John Parr*, *Mary Carter*, and *Robert Parſons*, before the commiſſioners; and on hearing what was alledged by Mr. *Fazakerley* and Mr. *Noel* of counſel for the petitioner, and Mr. *Chute* and Mr. *Legg* of counſel for the aſſignees, his Lordſhip did order, that the petition of the ſaid *William Hubert* ſhould be diſmiſſed; and the ſaid joint commiſſion againſt *Hubert* and *Nelſon* did accordingly ſtand. This commiſſion againſt *Hubert* depended upwards of two years. In *Trinity* term 1739, *Hubert* filed his bill in chancery againſt all the creditors under the joint commiſſion, except one Mr. *Thomas Cheſſon*, for a diſcovery how their reſpective debts aroſe; and to controvert among other things his being a partner with the ſaid *Robert Nelſon*, or him, his eſtate, or effects being liable to the debts or demands of the ſame creditors or any of them; and after ſuch ſuit had been ſome time depending, Mr. *Hubert* made an honourable propoſal to the creditors, which they all thought proper to conſent to; and upon payment of a certain ſum into the bank of *England* in the names of truſtees, the creditors entered into articles of agreement with *Hubert*, that they would accept the ſame in

full

full ſatisfaction of their debts; and that they would not only procure the ſaid commiſſion of bankruptcy to be ſuperſeded, but alſo the ſaid ſuit in chancery to be diſmiſſed out of court without coſts. The ſum agreed upon was afterwards paid by *Hubert* and the ſuit was diſmiſſed; and on the 12th day of *December* 1741, with the conſent of the creditors, the joint commiſſion of bankruptcy againſt *Hubert* and *Nelſon* was ſuperſeded.

It therefore behoves every one upon entering into partnerſhip to be very circumſpect, and not too haſtily form ſuch a connexion with one who is a ſtranger; for it ought not to be forgotten that one partner may contract debts, even in the partnerſhip itſelf, ſo far unknown to the other, as that the other may be involved in the danger of them, tho' he was not at all concerned in, or acquainted with them at the time they were contracted. So alſo may one partner diſcharge debts for the co-partnerſhip firm, and if he has an evil intention, may receive money and give receipts for it on the joint account, but, not carrying it to the common account, or not bringing the amount into caſh, may wrong the ſtock to ſo conſiderable a degree that it

might eventually prove the ruin of all the partners.

An evil-minded partner might likewiſe confeſs judgment, or give bonds, or notes in the name, and on the account of the co-partnerſhip firm, and yet convert the effects to his own private uſe, leaving the joint ſtock to be anſwerable for the value. Such an one might alſo clandeſtinely ſell and give credit, and deliver parcels of goods to what value, or what quantity his evil-intention might ſuggeſt, and to whom he pleaſed, and by ſuch connivance might loſe to the ſtock ſo large a portion of the property as to ruin the other partners by involving the whole co-partnerſhip firm in a ſtate of bankruptcy; for certain it is that one partner may commit acts of bankruptcy without the knowledge of his co-partners, and thereby ſubject the joint-ſtock and all the partners concerned therein to the hazard of a commiſſion, whilſt the other partners might remain ignorant of it till the blow was given, and in ſuch a manner, as to be too late to be retrieved.

Such being the dangers of partnerſhip in trade, it cannot but be obvious how extremely neceſ-

neceſſary it is for every one to weigh the diſadvantages, as well as the advantages of partnerſhip upon entering into ſuch a contract. And, in order to guard againſt the beforementioned dangers, I ſhall next proceed to point out ſome of the principal requiſites which are neceſſary to the carrying on partnerſhip with good effect.

CHAPTER VII.

Partnerſhip—
Carrying on.

WHEN we conſider that commerce is not a game of chance, but a ſcience, in which thoſe who are beſt ſkilled bid the faireſt for ſucceſs; and when we alſo conſider that *Great Britain* hath, by the force of her arms, the wiſdom of her councils, and the integrity of her merchants opened a communication in all quarters of the world for an unlimited commerce, we are led to diſcover the *uſe*, if not the *neceſſity* of partnerſhip to carry on commercial intercourſe. And the primary ingredients which are requiſite for the purpoſe of carrying on partnerſhip with effect are a ſtrictly moral conduct of the parties themſelves, independant of any contract whatſoever, together with thoſe poſitive as well as negative aſſiſtances which ought to be afforded by each of the partners in contracts to be made by them, and in all dealings and tranſactions throughout the joint concern; each ought likewiſe to abſtain from what is prohibited by law

and

and not render his partner liable for the commiſſion of any improper act, or the omiſſion of any known duty; and a ſtrictly juſt and regular account ought alſo to be kept and ſettled between them. For, when perſons have entered into partnerſhip with each other and become knit together as it were into a *kind of brotherhood*, "*Nam ſocietas quoddam* "*fraternitatis in ſe habet.*" It behoves each partner to exert ſo much of his activity and diligence, and to uſe ſuch precaution in every tranſaction, as the value of the buſineſs in his judgment deſerves, for, as partners are not always together when dealing, or perhaps ſeldom ſo, in the common concerns of buſineſs, it is abſolutely neceſſary that the moſt implicit confidence and reliance ſhould be placed in every one of the partners by each individually; and indeed the very nature of all partnerſhips whether expreſs or implied, muſt be founded upon ſuch reciprocal confidence: for by ſuch rules alone can mercantile concerns be negotiated; and conſequently the *ſlighteſt breach* of faith between them muſt in a moral ſenſe be conſidered a violation of their contract. And to the honor of the *Britiſh* nation, this doctrine is invariably held good by the *Engliſh* merchants,

altho' it does not originate here; for *Cicero*[a] in diſcourſing upon the ſubject of partnerſhips moſt emphatically ſays, "It is accounted a baſe thing to deceive a partner "*in ever ſo ſmall a matter*, and with reaſon. "For he who enters into partnerſhip does it "in hopes of gaining to himſelf an aſſiſtant: "To whom therefore can *he* fly for ſuccour, "that ſuffers from *him* on whom he depended? Thoſe crimes are of the blackeſt "hue, againſt which there is the leaſt guard. "We may defend ourſelves againſt the malice of others, but to an intimate friend "we lie open. For how can we provide "againſt a partner, whom we cannot ſo "much as ſuſpect without violating our "duty? Well therefore did our anceſtors "judge him who deceived his friend in this "point, fit to be reckoned amongſt the "worſt of villains."

[a] *Tully*'s words are, "*In rebus minoribus ſocium fallere turpiſſimum eſt neque injuriâ; propterea quod auxilium ſibi ſe putat adjunxiſſe, qui cum altero rem communicavit. Ad cujus igitur fidem confugiet, cum per ejus fidem læditur, cui ſe commiſerit? Atque ea ſunt animadvertenda peccata maxime, quæ difficillime præcaventur. Tecti eſſe ad alienos poſſumus, intimi multa apertiora videant neceſſe eſt; Socium vero cavere quî poſſumus? Quem etiam ſi metuimus, jus officii lædimus. Recte igitur majores eum, qui ſocium fefelliſſet, in virorum bonorum numero non putarunt haberi oportere.*

Orat. pro Roſcio Amerino, chap. 40.

It

It has already been obſerved, that upon entering into partnerſhip, which is a contract reciprocally beneficial to all parties, ſuch care is exacted from each as every prudent man commonly takes of his own affairs; and in carrying on partnerſhip, the partners owe reciprocally to one another an upright fidelity and integrity, ſuch as may engage every one of them to ſhare with the others whatever they have belonging to the co-partnerſhip, with all the profits and advantages which may accrue from thence, and not to reſerve any thing to themſelves, but what they lawfully may by their contract. So, that beſides the fidelity which the partners owe to one another, they likewiſe owe their care and attention for the affairs and effects of the co-partnerſhip. But, inaſmuch as their fidelity cannot be limited, for it admits of no bounds, they are obliged, with reſpect to the care which they owe, to uſe only the ſame application and vigilance in the partnerſhip concerns, as they uſe in their own. And this duty of care and vigilance which the partners owe to one another being regulated by the care which they have of what is their own, it ought not to be conſtrued to extend to the greateſt exactneſs that the *moſt* careful and vigilant perſons are capable of; but only to make them reſponſible

for all deceit, and for all groſs faults; for, if a partner who takes the ſame care of the common affairs in carrying on the partnerſhip, as he does of his own, ſhould chance to fall into ſome ſlight fault without any evil intention, it would be unreaſonable if he were to be made accountable for it; partners never being conſidered reſponſible for any accident, unleſs occaſioned by ſome fault for which they ought to be anſwerable. It has been made a queſtion, whether a partner, like a bailee, is accountable for fraud only, or whether he is alſo accountable for his negligence in carrying on trade? And it now prevails, that he is anſwerable for all the damages which happen through his *fault* [b]. But if a man fails in having uſed the *moſt exact diligence*, ſuch a failure is not comprehended under the term CULPA, or *fault*: for a partner is not liable to anſwer damages, if, in regard to the goods of the partnerſhip, it appears, that he has uſed the ſame care and diligence towards them, which he has uſually obſerved in keeping his own individual property. For it is certain, that whoever chuſes a negligent man for his partner, can lay the blame upon himſelf alone, and muſt impute his misfortune to his own ill choice [c].

[b] *Societas et rerum communio et dolum et culpam recipit.* D. 50. 17. 23.

[c] Inſt. lib. 8. tit. 26.

In

In carrying on a partnerſhip, where the ſtock, the firm, duration, the diviſion of gain or loſs, and other circumſtances are fully aſcertained: all the partners are generally authoriſed to ſign by the name and firm of the company, becauſe their intereſts are undivided [d], although their degrees of intereſt may differ; yet at the ſame time this privilege may be confined to ſome one or more of the partners by particular agreement. It often happens that the ſame partners carry on buſineſs at different places, in which caſe they ſometimes vary their ſtile and firm.

After a partnerſhip is entered into, and is begun to be carried on, the ſignature of each partner is uſually ſent to the correſpondents, and ſo continue to be ſent as new correſpondents ariſe. And when a new partner is admitted, although there be no *public notice* of alteration in the firm, his ſignature ought to be tranſmitted, with an intimation of the change in the co-partnerſhip to all their correſpondents. Nevertheleſs, mercantile houſes that have been long eſtabliſhed, often retain the old firm, though all the original partners be dead or withdrawn.

[d] Ante p. 2.

In carrying on partnerſhip trade, the powers of each partner are in general diſcretionary; but at the ſame time partners ought not to act, in matters of importance, without conſulting together, provided opportunity offers. For, though a partner is only bound to take the ſame care in a co-partnerſhip dealing as he would of his own ſingle concern, and may not be liable to make good the loſs ariſing from his judging wrong in a caſe where he had *authority* to act; yet, if it can be made out that he *excceded* his power, and the event prove unſucceſsful, he muſt bear the loſs: if it were otherwiſe, indiſcreet partners might lead thoſe with whom they were connected into the worſt of difficulties againſt their conſent.

Having endeavoured to trace out ſome of the chief requiſites, as well as general rules neceſſary to the carrying on partnerſhip with effect, it will be the buſineſs of the next chapter to ſhew by the ſeveral deciſions in our courts what are conſidered to be the rights of partners as between themſelves.

CHAPTER VIII.

As between Partners themſelves, Their Rights.

PARTNERS being ſeiſed *per my et per tout*, they muſt in all caſes be conſidered as joint-tenants in the ſtock and all their effects; and not only of ſuch particular ſtock, as may be in trade at the time of their entering into partnerſhip, but throughout all the ſubſequent changes in their co-partnerſhip dealings; conſequently nothing can be conſidered as the *excluſive right*, or actual ſhare of one partner, but his proportion of the reſidue, upon a balance being ſtruck, of the accounts between them. To illuſtrate which doctrine I ſhall proceed to ſtate, in the firſt place, the caſe of *Smyth* v. *De Sylva*[a], which was an iſſue directed out of the Court of Chancery, to try whether the plaintiffs, as aſſignees of *Edward Hague* a bankrupt, were entitled to *one third* part of the profits of the adventure of the ſhip *Unanimity*, from *London* to *Africa*, from *Africa* to *Jamaica*, and from thence to *London*, and alſo of the ſale of the ſhip.

a Cowp. 471.

This

This cauſe came on to be tried at *Guild-hall, London*, at the Sittings after *Eaſter* Term 1776, before Lord *Mansfield*, when the jury found a verdict for the plaintiffs, damages one ſhilling, and coſts forty ſhillings, ſubject to the opinion of the Court upon the following caſe:

That in *December* 1771, *Edward Hague* the bankrupt, together with the defendants *Iſaac Bernal* and *Abraham Lara*, agreed to purchaſe and fit out a ſhip for the ſlave trade, at their joint expence, and for their *joint account* and riſk in *thirds:* and that the other defendant, *De Silva*, ſhould have the conduct and management of fitting out the ſhip as a purſer or ſhip's huſband, for the benefit of the parties concerned. That *Hague*, in *December* 1771, purchaſed the ſhip in queſtion for 680*l.* and ſoon after gave a bill of ſale of one third part to the defendant *Bernal*, and to the defendant *Lara* a bill of ſale of one other third part: that ſoon afterwards the defendant *Lara* ſold one moiety, or half-part of his third part, to the other defendant *De Silva*. That *De Silva* was at the whole expence of fitting out the ſhip for ſea, and ſupplying her cargo, &c. amounting to the ſum of 4658*l.* 15*s.* 1*d.* of which, the defendants *Lara* and *Bernal* duly

duly paid him their reſpective proportions: but *Hague* paid only 410*l.* 11*s.* 7*d.* in caſh, and gave two promiſſory notes, one for 403*l.* 4*s.* 5*d.* payable at ſix months, the other for 739*l.* 2*s.* 4*d.* at twelve months for the remainder. That *De Silva* paid in ready money towards the expence of the outfit, the ſum of 1331*l.* 14*s.* 9*d.* only; and that he had ſix months credit for 1209*l.* 13*s.* 3*d.* part of the outfit and cargo thereof, and twelve months credit for the remaining 2217*l.* 7*s.* 1*d.* from the 1ſt of *January* 1772. That the ſaid ſhip ſailed for *Graveſend* on or about the firſt of *March* 1772, and arrived ſafe, &c. That before the promiſſory notes ſo given by the bankrupt became due and payable, and likewiſe long before the ſhip arrived at *Jamaica*, *viz.* on the ſecond day of *July* 1772, *Hague* was declared a bankrupt. It could not be known for ſeven or eight months after, whether the ſhip would make a profitable voyage or not. The plaintiff *Nutt*, one of the aſſignees, applied ſeveral times to the defendant *De Silva* to take the bankrupt's ſhare or intereſt in the ſaid ſhip, and the profits and riſk thereof to himſelf; and to pay the plaintiffs the ſaid ſum of 410*l.* 11*s.* 7*d.* being the money the bankrupt had actually paid on account thereof, which the defendant

De

De Silva at firſt refuſed: but endeavoured all he could to ſell the bankrupt's ſhare in the ſhip, and the outfit and profits thereof, to ſome other perſon, who would pay the 410 *l.* 11 *s.* 7 *d.* to the plaintiffs, his aſſignees, and to pay for the remainder of the outfit thereof: but not being able ſo to do, the defendants *Bernal* and *Lara*, about a month or two *after the bankruptcy of Hague*, were after much intreaty prevailed upon by the defendant *De Silva*, to join with him to take the remainder of the bankrupt's ſhare, equally between them, and to pay the ſaid 1142 *l.* 6 *s.* 9 *d.* between them in equal proportions, being the remainder of the money the bankrupt had agreed to pay towards the ſhare thereof he had propoſed to take. The defendant *Bernal* accordingly paid the defendant *De Silva* one third part of the ſaid ſum of 1142 *l.* 6 *s.* 9 *d.* and the defendant *Lara* paid him the other third part thereof; and the defendants, from that time, conſidered the plaintiffs (the aſſignees) as intereſted in the ſhare of the ſhip, ſo to have been taken and paid by the bankrupt, only as the ſum of 410 *l.* 11 *s.* 7 *d.* was to the ſum of 4658 *l.* 15 *s.* 1 *d.* the amount of the coſts and outfit of the ſaid ſhip and cargo: and that the defendants were entitled to the remaining part of the ſhare the bankrupt had

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originally propoſed to take. That the plaintiff *Nutt* preſſed the defendant *De Silva* ſeveral times to pay the ſaid 410*l.* 11*s.* 7*d.* and to take the ſame to himſelf, with the profits and riſk thereof. That the firſt intelligence the defendant had of the ſhip having made a profitable voyage, was on the 24th *February*, 1773. The queſtion was, Whether the aſſignees, as ſtanding in the place of *Hague* the bankrupt, were entitled to one third, or to what other ſhare of the profits of the adventure?

Mr. *Mansfield* for the plaintiffs; Mr. *Dunning* for the defendants.

Lord *Mansfield*, after ſtating the caſe, proceeded thus: The adventure having proved a profitable one, the queſtion is, what ſhare the aſſignees of *Hague* are entitled to; whether they are entitled to *one third* of the profits, and of the money ariſing from the ſale of the ſhip, or only to the proportion which the ſum of 410*l.* paid in money by *Hague* towards the expence of fitting out the ſhip, &c. bears to the whole amount of ſuch original expence, which was 4658*l.*? There is no difference between the rule which muſt govern the determination of this caſe in a court

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court of law or equity. It depends upon the right of the bankrupt: and to find out what the right of the bankrupt is, it will be neceſſary to conſider *firſt*, how it ſtood at the time of the bankruptcy; and *ſecondly*, whether any alteration has happened ſince to vary ſuch right. *Firſt*, At the time of the bankruptcy, the whole expence was incurred. *Hague* was liable to *De Silva* for the amount of the notes and a partner in thirds. The adventure was then at ſea, and *De Silva*, as purſer or huſband of the ſhip, was liable to him for the amount of his third ſhare of the profits, whatever they might be. But ſuppoſe the other partners were liable to thoſe who truſted *De Silva*; the conſequence on a bankruptcy between partners is, that they are entitled as againſt each other to the balance of accounts; and ſo it was ſettled in the caſe of *Skip* v. *Harwood*, before Lord *Hardwicke*, in Chancery. Therefore, if the other partners had been obliged to diſcharge the amount of the notes which remained unpaid at the time of the bankruptcy, the aſſignees muſt have allowed the other partners the full ſum paid for the bankrupt, and could have come againſt them only for the balance due to him, if any. This is not the caſe of a *new* trading, or a new adventure begun *after* an act of bankruptcy.

In

In *that* caſe, it is fair to ſay, that the bankruptcy diſſolved the partnerſhip: but here, all the expence was incurred prior to the bankruptcy; and if the bankrupt by an acceſſion of fortune had had ſufficient, and the voyage had proved a loſing one, he would have been liable for the whole in proportion with the other owners. Therefore, he had clearly a *right* to a third of the profits at the time of the bankruptcy; and the inſolvency of the bankrupt does not vary his right. *Secondly*, there has been nothing done ſince which can make the leaſt variation: for every thing that has been done, was done without the privity of the bankrupt or the aſſignees. Conſequently, their right cannot be varied by an agreement between other perſons, in which they were not concerned. It is immaterial whether *De Silva* pledged his own credit only to the tradeſmen, and took the ſeparate credit of the partners for the ſhare of each, or whether the other partners were liable to the tradeſmen for the whole. The queſtion is, what was the *right* of the bankrupt? If the other partners were not liable to *De Silva* for his ſhare, yet the bankrupt, upon paying the full amount of his ſhare, was entitled to a third of the profits, as he would have been liable to a third of the loſs, if the adventure

had been unprofitable. When I ſay upon payment in full, I mean payment according to law. If he had not become bankrupt, it muſt have been an actual payment of the whole of his ſhare; but as he is become bankrupt, it muſt now be a payment according to the diſtribution made by law in that caſe; which is a proportionable dividend with the reſt of the creditors. Therefore, whether it were a profitable or a loſing adventure, cannot vary the right. The conſequence is, that the aſſignees are entitled to one third of the ſhip and adventure in queſtion.

Aſton and *Aſhhurſt*, Juſtices, of the ſame opinion.

Per Cur. Let it be indorſed on the *poſtea*, that the aſſignees of the bankrupt are entitled to one third of the value of the ſhip, and of the profits of the adventure in queſtion. And we find alſo the ſame principle eſtabliſhed in a variety of other caſes. Thus in *Heydon* v. *Heydon*, *Mich.* 5 *W.* & *M* [b]. another perſon being co-partner with the defendant, a judgment was obtained againſt him, and all the goods of both of them were taken in execution.

[b] Holt C. J. 302.

Holt

Holt C. J. and the Court adjudged that the Sheriff muſt ſeize all the goods, for the moieties are undivided; and if he ſeized but a moiety, and ſells that, the other copartner will have a right to a moiety of that moiety; therefore he muſt ſeize the whole, and ſell the moiety thereof, and then the vendee will be tenant in common with the other partner [c].

See here in like caſe by *Holt* C. J [d]. Although partners have joint and undivided intereſts, yet only the ſhare or part of him againſt whom execution is ſued, and no more, can be ſeized upon this execution.

And likewiſe in the caſe of *Bachkurſt* v. *Clinkard*, *Mich.* 2 *W.* & *M* [e]. Caſe againſt the defendant as Sheriff of *Kent*, reciting a judgment at the plaintiff's ſuit againſt *William Dykes*, for 400 *l.* and a *fieri facias* thereon delivered to the Sheriff, that though *Dykes* had divers goods and chattels, yet he had neglected to ſeize them, and made a falſe return of *nulla bona*; *non cul.* Pleaded on a trial before the Lord Chief Juſtice *Holt*. The caſe was thus: *Dyke*, *Brown* and others were

[c] 4 Bac. Abr. 460. Salk. 392.
[d] 1 Show. 173, 174. Comb. 217.
[e] Holt 643.

partners of ſeveral goods of great value: *Brown* being indebted, a *fieri facias* was ſued againſt him, and thereon theſe goods were all ſeized, and in the Sheriff's cuſtody, and conſequently not liable to the plaintiff's execution. Held by *Holt* C. J. that being once ſeized in a cuſtody of law, they could not be ſeized again by the ſame or another Sheriff; and if they were ſold thereon, ſuch bargain would be void. Held alſo that though they had joint and undivided intereſts, yet only the ſhare or part of *Brown*, and no more, could be ſeized upon the execution againſt *Brown*'s goods; and conſequently *Dyke* had goods; and ſo the return was falſe, and verdict and judgment for the plaintiff.

Holt C. J.— The Sheriff has no power to receive money from the defendant upon a capias; his buſineſs is only to execute his writ: and if in ſuch caſe the Sheriff after became inſolvent, and do not pay the plaintiff, ſuch payment ſhall not excuſe the defendant. If Sheriff ſuffer one execution to eſcape, the plaintiff has his election to ſue the Sheriff upon the eſcape, or elſe the defendant, but he cannot have a capias againſt the defendant without a *ſcire facias*.

So in *Eddie* againſt *Davidſon* f. In this caſe the *defendant* was partner with one *Birnie*, againſt whom a commiſſion of bankrupt had iſſued, but, before the bankruptcy, the *plaintiff* had ſued out execution on a bond of the *defendant*'s for 700 *l.* and the Sheriff had levied on the partnerſhip effects. *Bernie*'s aſſignees obtained this rule, to ſhew cauſe why the Sheriff ſhould not pay them a moiety of the money ariſing from the ſale of the goods ſo taken in execution, upon an affidavit of *Bernie*'s, that he was entitled to an equal ſhare of the partnerſhip effects, as partner with *Davidſon*. The *plaintiff's affidavit*, on ſhewing cauſe, denied that *Bernie* had an equal ſhare in the partnerſhip effects, and ſtated that he had embezzled the joint-ſtock to a conſiderable amount.

The Court directed that it ſhould be referred to the Maſter to take an account of the ſhare of the partnerſhip effects to which *Bernie* was entitled; and that the Sheriff ſhould pay a part of the money levied, equal to the amount of ſuch ſhare, to the aſſignees.

f Douglas 650.

Thus where two joint-partners are in trade. Judgment was entered againſt one of them. And upon a *fieri facias*, all the goods, being undivided, were ſeized in execution. And upon application to the King's Bench by him againſt whom the judgment was not, the Court held, that the Sheriff could not ſell more than a moiety, for the property of the other moiety was not affected by the judgment, nor by the execution. *Jacky* v. *Butler* g. And the ſame principle is alſo adhered to in the caſe of *Richardſon* v. *Goodwin* h; where *Richardſons* ſenior and junior, and one *Janſon* were partners together in trade, and *Janſon* embezzled and waſted the joint ſtock, and contracting private debts became a bankrupt. The Court ſeemed to think, that out of the produce of the goods, the debts owing by the joint trade ought to be paid in the firſt place, and that out of *Janſon*'s ſhare, ſatisfaction muſt be made for what *Janſon* had waſted or embezzled; and that the aſſignees could be in no better caſe than the bankrupt himſelf, and were entitled only to what his third part would amount unto,

g 2 Ld. Raym. 871. Comb. 217. S. P. 3 P. Wms. 25. Vide 12 Mod. 446.

h 2 Vern. 293.

clear

clear after debts paid, and deductions for his embezzlement.

And this rule has been ſince confirmed by a decree of Lord *Talbot*'s. *Goſs* v. *Dufreſnoy*[i].

A bill was brought, ſetting forth that *Goſs*, *Neaulme*, *Gromvegan* and *Prevoſt* became partners. That *Prevoſt* was intruſted with the goods in the ſhop and warehouſe, but became profuſe, and embezzled the partnerſhip ſtock, and applied the ſame to his own uſe, and ſuffered the partnerſhip debts to be unpaid; and having contracted private debts on his own account, became a bankrupt, and a ſeparate commiſſion was taken out againſt him.

A queſtion was raiſed, whether *Prevoſt*'s ſhare of the partnerſhip ſtock ought to be applied, in the firſt place, to pay what he was indebted to the partnerſhip?

Lord *Talbot* ordered an account of what *Prevoſt* had embezzled of the partnerſhip eſtate, and that the partnerſhip debts ſhould in the firſt place be paid to the joint-creditors in proportion to their debts, and as far as the

[i] Davies 371.

partnerſhip eſtate will extend; and that if any of the partnerſhip eſtate remains, after the joint-debts are paid, then the ſame to be divided, and the partnerſhip to be paid out of *Prevoſt*'s ſhare what he had embezzled.

Therefore if one partner dies, though the debts and effects ſurvive, yet the ſurvivor is conſidered in equity barely as a truſtee for the repreſentatives of the deceaſed, upon which footing the accounts muſt be taken, and nothing conſidered as the ſhare of the ſurvivor till afterwards, becauſe of the continuance of the property in the ſtock to the repreſentative of the deceaſed partner, who has a ſpecific lien thereon, although the ſurvivor afterwards dies or becomes bankrupt.

And if the partnerſhip is diſſolved by conſent, that does not determine the legal intereſt, which continues as before; ſo that the property of the ſtock of the partner ſo going out, is not deveſted thereby, but he remains equally entitled as joint-tenant with the other; and in a bill for an account, the ſtock would be ſubjected for his ſatisfaction. And as between one partner and the ſeparate creditors of the other, they cannot affect the ſtock any further than that partner could, whoſe creditors they are.

Thus

Thus in the caſe of *Weſt* and *Skip* [k], where a partnerſhip was entered into in a brewery, between *Skip*, and *Ralph* and *James Harwood*, and particular terms then agreed on between them, that *Skip* ſhould have ſuch a proportion of the out ſtanding debts, and a lien and ſecurity on the partnerſhip ſtock, to make that ſhare of thoſe debts good to him according to the value ſet on them, with penalty in caſe of a breach. After this ſome differences aroſe between them on a ſuggeſtion that *Ralph Harwood* drew more than he ought out of the ſtock, and received debts without the privity of *Skip*, with ſeveral other breaches of covenant and miſbehaviour; which produced an action by *Skip* for the penalty of the articles; in which a judgment was recovered: but before execution thereon, *Ralph Harwood* confeſſed a judgment to his ſiſters; who took out execution by *elegit*, and laid hold of the partnerſhip ſtock, which was aſſigned by the Sheriff. *Skip*, inſiſting that this was a fraudulent act to cover the effects, took out a commiſſion of bankruptcy againſt *Ralph Harwood:* upon whoſe application to ſuperſede it, iſſues were directed to try whether he was a bankrupt or not at the time of the commiſ-

[k] 1 Vezey 242.

ſion.

ſion. But inſtead of trying it, the partners came into a rule by conſent, by order of *Niſi Prius*, which was afterwards made a rule of C. B. and which order was, that *Ralph Harwood* ſhould execute a bond with penalty to *Skip*, and procure two other bonds with penalty conditioned to pay to *Skip*, what ſhould be due to him on the day of the date of the order, with the intereſt; and ordered with like conſent, that the partnerſhip ſhould ceaſe as on that day, and the account of the partnerſhip trade ſhould be carried on to that day, and no farther: and that upon *Ralph Harwood*'s giving ſuch ſecurity as before mentioned, the commiſſion ſhould be ſuperſeded, the officers diſcharged, and the effects delivered. Under this order nothing effectual was done; the whole thereof depending upon *Ralph Harwood*'s giving the ſecurity therein mentioned; which he not performing, motions were made in C. B. for attachments againſt him for contempt in breaking this rule; which, being found to be only a perſonal remedy with no effect, produced an application to Chancery under the commiſſion of bankruptcy: and by conſent of the parties it was ordered, that the rule of C. B. ſhould be diſcharged, except ſo much as related to the diſſolution of the partnerſhip; and ordered

dered to reſtrain *Harwood* from diſpoſing of any of the effects except in the way of trade; and that it ſhould be tried again. On the trial a verdict was found, that at the time of iſſuing the commiſſion *Harwood* was no bankrupt; and ordered, that the commiſſion ſhould be ſuperſeded. *Skip* filed a new bill in this court, ſetting forth all this; praying an account and ſatisfaction for the breaches of covenant, and to be paid what was due to him out of the goods and effects taken in execution; and that the defendant might be reſtrained from getting in the partnerſhip effects to his prejudice. The cauſe was put off ſeveral times, that *Harwood* might find ſecurity, to prevent the appointing a receiver. But upon his not doing it a decree was made, and a receiver appointed. It appeared afterward, that *Harwood* had endeavoured to ſecrete the effects in a very extraordinary manner during the hearing of the cauſe, after the propoſitions made to him, and time given him to comply therewith; getting in the debts, and giving receipts where nothing was paid; which produced a commiſſion of bankruptcy by other creditors eight days after making the decree: and theſe acts of *Harwood*, done really to elude the decree and appointment of the receiver, were now ſet

up

up as acts of bankruptcy. This occasioned new contests, and a new bill by the assignees, insisting that *Skip* has no property either legal or equitable against them: but that his debt ought to be levelled with all the other debts of *Harwood*: and he be considered barely as a creditor. And *Skip* brought a bill to have the partnership estate first disposed of for his satisfaction: and that nothing should be considered as belonging to the *Harwoods* till after that deduction: and to carry on the former decree.

Lord Chancellor.—The main, if not the only question is, first, whether *Skip* has any interest in, or specifick lien upon this stock; Another and very different question, (though it has not been treated as different at the bar) is, Whether the sisters, defendants to both bills, are to be considered, as between them and the assignees, as having any interest in, or specific lien upon this stock; the first decree having considered them, from the time of the *elegit*, as partners; the first must be considered in two lights; first, whether *Skip*, as between him and the *Harwoods*, is to be considered as having any specific interest at the time of the commission. Secondly, supposing he had, whether any thing happened

to

to vary that right, as between him and the aſſignees; particularly whether this ſpecific lien is gone by the 21 *Jac.* 1. *c.* 19. and theſe goods to be conſidered as the effects of the bankrupt, to be diſtributed among all the creditors. As to the firſt, it is inſiſted, that from the diſſolution of the partnerſhip by the order of Niſi Prius, *Skip* had parted from or varied his ſpecific lien in the goods, and had reſorted by conſent to take perſonal ſecurity for his demand; and that however that be as to the old ſtock, yet as to the new, he certainly can have no ſpecific property, intereſt, or lien thereupon. It is neceſſary to conſider what kind of lien *Skip* had originally, as between him and the other partners: then how it was after the diſſolution: then how it would have ſtood, if the queſtion had ariſen between the repreſentative of a partner and ſurviving partner; as that will go a great way to determine the other. The partners themſelves are clearly joint-tenants in the ſtock and all effects: not only that particular ſtock in being at the time of entering into the partnerſhip; but to continue ſo throughout; whatever changes might be made in the courſe of trade. Otherwiſe it is impoſſible to carry it on. And being ſeiſed *per my et per tout*, when an account is to be taken,

taken, each is intitled to be allowed againſt the other every thing, he has advanced or brought in as a partnerſhip tranſaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought: and nothing is to be conſidered as his ſhare, but his proportion of the reſidue on balance of the account. That this is ſo at law, appears from two caſes, 2 Ld. *Raym.* 871. and *Heydon* v. *Heydon*, *Salk.* 392. where it was held, that judgment and execution againſt one partner for his ſeparate debt does not put the other in a worſe condition; for he muſt have all the allowances made him before the judgment creditor can have the ſhare of the other applied to him. So if one partner had died, the debts and effects ſurvived: but yet the ſurvivor is conſidered in this court barely as a truſtee for the repreſentatives of the deceaſed; upon which footing the account would be taken, and nothing conſidered as the ſhare of the ſurvivor till afterward: which is from the continuance of the property in the ſtock to the repreſentative of the deceaſed partner, who has a ſpecific lien thereon, although the ſurvivor afterward dies or becomes bankrupt. So if the partnerſhip was diſſolved by conſent; as in this caſe, that determines

termines not the legal intereſt, which continues as before; ſo that the property in the ſtock of the partner ſo going out is not deveſted thereby, but he remains equally intitled as joint-tenant with the other; and in a bill for an account the ſtock would be ſubjected for his ſatisfaction. Then as between one partner and the ſeparate creditors of the other, the law and thoſe two caſes beforementioned ſay that they cannot affect the ſtock any farther, than that partner could, whoſe creditors they are. It is objected, that all this is allowed by the rule, by which *Skip* conſented to determine the partnerſhip, and that perſonal ſecurity ſhould be given; which is a waving his property, and reſorting to perſonal ſecurity: but that is a moſt ſtrained conſtruction, and there is nothing in the rule to import it. The price to be paid for *Skip*'s ſhare remained to be ſettled, and the bond for payment was never executed; *Harwood* having trifled and performed no part. It is impoſſible therefore to conſider *Skip* as parting with his lien upon this ſtock by this rule, when nothing was done toward carrying it into execution. But the ſubſequent proceedings ſhew, that *Skip* inſiſted on it, *viz.* his bill, and the order was made to reſtrain *Harwood* from diſpoſing of his effects;

fects; for which order there would be no ground, had *Skip* been conſidered only as a ſeparate creditor, and not as having a ſpecific lien. But the more material conſideration is; whether any, and what alterations is made by theſe acts of bankruptcy, and the commiſſion thereon; which ſhall now be taken for granted to have well iſſued, and to have been acts of bankruptcy, without entering into that queſtion. And to ſhew that in point of law and equity ſuch an alteration has been, and thereby *Skip* has loſt his ſpecific lien, the clauſe in 21 *Jac.* 1. *c.* 19. is inſiſted on: the conſtruction of which clauſe has been much controverted and argued in the caſe of *Ryal* v. *Rowles*; which caſe yet waits for the opinion of the Judges; and therefore I at firſt doubted, whether it ſhould not wholly ſtand over, till that reſolution is given. But on conſideration I think, I can form an opinion (at leaſt to ſatisfy myſelf) without prejudice to any queſtion, that may ariſe in that caſe; of which this will ſtand clear. Firſt obſerve, that this is not a caſe ſtrictly within the words of the preamble of that clauſe; which is a deſcription only of goods and effects of the bankrupt himſelf, conſigned by him to another, who ſuffers them to be left in the poſſeſſion of the bankrupt. And in *L'Apoſtre*

v. *Le*

v. *Le Plaiſtrier*, cited in 1 *Wms.* 318. it was held by *Holt* C. J. that the enacting clauſe ſhould be explained by the preamble; but my opinion ſhall not be founded on that. This caſe clearly, according to *Holt*'s opinion, would not be within this clauſe; for *Skip*'s ſhare was his own; not being aſſigned by him to *Harwood*; nor within the preamble. But I will not determine a point, in which ſuch great Judges differed; as Lord *Cowper* did, with ſome warmth, from *Holt*, in the caſe of *Copeman* v. *Gallant*, 1 *Wms.* 314. nor is it neceſſary.

But what I found myſelf upon, is, that by the enacting clauſe to ſubject goods to the creditors of another perſon, thoſe goods at the time of bankruptcy ſhould be left in the poſſeſſion, order or diſpoſition of the bankrupt; ſo that he might take upon himſelf to ſell or diſpoſe as owner: and there has been no caſe upon this act, or ever will be, wherein a court of law or equity will do ſo ſevere a thing as to ſubject the property of one to the debts of another, without proof of the conſent of the real owner to leave them in the power of the bankrupt (poſſeſſion not only being ſufficient) or a *laches* in letting them remain there, ſo as to gain him a falſe credit.

The contrary of which appears here; for it is impoſſible to take more methods to prevent it, than *Skip* did; the evidence being that there is no ſuch implied conſent, eſpecially as there was no execution by *Harwood*. Nor do I found myſelf on the notion of a *lis pendens*; which, it is inſiſted for *Skip*, ſubſiſted at the time of the bankruptcy, by the bringing his bill, ſo as to be ſufficient notice; which queſtion I would not willingly determine, becauſe there is no caſe, where this court has determined the property of goods to be affected by reaſon of a *lis pendens*, where poſſeſſion is the principal evidence of ownerſhip, as of perſonal chattels, which might be of dangerous conſequence: though as to real eſtate it may be otherwiſe. But what I go upon is, that this caſe is not within the act of Parliament: therefore if the queſtion aroſe on the caſe of the mortgage of goods, or an abſolute ſale, and the vendor did not deliver them at the time appointed, but on trover againſt him kept the vendee at arms length, and in the mean time became bankrupt; this would not be conſidered as a leaving the goods by vendee in the poſſeſſion of the bankrupt within the act; the vendee having done every thing in his power to get the poſſeſſion from him. So if a mortgage (which is the

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caſe of *Ryal* v. *Rowles*) of goods, which are contracted for and agreed to be delivered into the party's own hands, or the key of the warehouſe (which in bulky goods is all that can be done) but no ſuch delivery is made; and a bankruptcy follows; *detinue* having been brought for them, they would not be conſidered as left in the poſſeſſion of the bankrupt; the purſuit in a court of juſtice excluding any actual or preſumed conſent. Farther ſtill: ſuppoſe a partnerſhip determined by effluxion of time; one intends to continue the trade, the other will not, inſiſting upon a diviſion; and on non-compliance brings an action at law, or a bill in equity for an account, and to reſtrain the diſpoſing of thoſe goods, the poſſeſſion of which is wrongfully kept from him by his partner; who pending this becomes bankrupt: this would not be within the ſtatute.

Skip therefore is intitled to the ſame ſpecific lien againſt the aſſignees as againſt *Harwood*: and that even as to the new ſtock; for in all thoſe caſes of a lien on a partnerſhip it is not conſidered as appropriated to the ſtock brought in, but to every thing coming in lien during the continuance or after the determination of the partnerſhip. As in *Bucknal* v.

Roiſton, Prec. Chan. 285. where a lien was held to be on thoſe goods, which were the produce of the original goods. So in *Brown* v. *Heathcote, Mich.* term 1746, I held, that it continued, on what was the produce by way of barter and ſale: and that holds much more ſtrongly in the caſe of a partnerſhip trade which cannot otherwiſe be continued. It is ſaid, that the acts of Parliament relating to bankrupts intended to level theſe ſpecific liens, as they do judgments unexecuted: but that is becauſe of the expreſs words of the act of Parliament, that judgments unexecuted ſhould be levelled; for otherwiſe they would continue ſpecific liens. Another queſtion is between the aſſignees and the ſiſters; in which ariſes a difficulty in reſpect of the penning of the former decree; which could not then be foreſeen; as then no bankruptcy had taken place, and the *Harwoods* themſelves were partners. The ſiſters inſiſt on two ſpecific liens; firſt by the inquiſition taken by the *elegit*; ſecondly by aſſignment of the officers of exciſe when the effects were ſeized. Upon which a very different queſtion ariſes, as between the aſſignees and the ſiſters, from what it was between *Skip* and the ſiſters; for as againſt *Skip* the ſiſters could only affect the ſhare of *Harwood*, on the authority

thority of *Heydon* v. *Heydon*, and 2 Ld. *Raym.* 871. It was immaterial to *Skip* to enter into the queſtion, whether they are general creditors or not: but as the aſſignees can only affect a ſhare of that ſhare, it may be very material to them, whether the ſiſters have gained a preference by thoſe two liens. And that may be influenced by the opinion of the Judges in *Ryal* v. *Rowles:* for the ſiſters on the *elegit* do not take poſſeſſion of the goods but leave them abſolutely with the *Harwoods*. The queſtion therefore ariſes, whether by this clauſe they are not excluded, being either a plain conſent or great *laches:* and it holds more ſtrongly againſt a creditor by execution than any other; for if a creditor by *fieri facias* ſeizes the goods of the debtor, and ſuffers them to remain long in the debtor's hands, and another creditor obtains a ſubſequent judgment and execution; it has been determined often, that it is evidence of fraud in the firſt creditor, and the goods in the hands of the debtor remain liable. As to them therefore the point ſhall remain till the determination of that queſtion. The bill therefore muſt be diſmiſſed, ſo far as it ſeeks to come upon the ſpecific lien of *Skip*; but in juſtice to the aſſignees, the other queſtion muſt be reſerved: and if by the determina-

tion of *Ryal* v. *Rowles* I ſhould think, the ſiſters have loſt their ſpecific lien, I may come at it by varying the former decree; conſidering them, inſtead of partners, as gaining a lien, but as having loſt it by *laches*, and to receive a dividend as general creditors of the *Harwoods*. The only difficulty objected is, that on a bill to carry a former decree into execution, the Court can only do that, and not vary; and the general rule is ſo. But there are ſeveral inſtances wherein the Court has conſidered the directions, and whether there was any miſtake: as has been done by Lord *Cowper*, to attain the juſtice of the caſe; and may be done here, eſpecially as between new parties.

And the ſame rule was recognized and adhered to by Lord *Thurlow* in the caſe of *Hankey* againſt *Garratt*[1]. And afterwards confirmed by Mr. Juſtice *Buller* (in the ſame caſe) ſitting for his Lordſhip, *November* 29, 1792; which caſe is reported as follows:

Wooldridge and *Kelly* were partners in trade, and failed in 1777, and *Kelly* then reſiding in the *Daniſh* iſland of St. *Thomas*, a

[1] 3 Bro. 457.

commiſ-

commiſſion of bankruptcy was iſſued, dated 10th *July* 1777, againſt *Wooldridge*, by the deſcription of *Thomas Wooldridge* of the *Creſcent*, *London*, merchant, in partnerſhip with *Henry Kelly*, late of the ſame place, merchant: *Holland Pope* and *John Hawkins* were choſen aſſignees. *Pope* died ſoon after, and *Hawkins* became inſolvent in 1779. In 1780 the defendants *Garrat* and *Rowlatt*, were choſen aſſignees, and received from *Pope*'s repreſentatives and from *Hawkins* a conſiderable ſum of money ariſing from the joint property of *Wooldridge* and *Kelly*. Afterwards an action was brought againſt *Kelly*, on which he was outlawed, and a joint commiſſion was iſſued againſt both, (tho' *Kelly* was abroad, and had committed no act of bankruptcy) but this outlawry was afterwards reverſed, and the commiſſion ſuperſeded.

The aſſignees having in their hands about 3000 *l.* or 4000 *l.* in *April* 1784, and in *December* 1787, petitions were preſented by joint creditors, praying for a dividend; in conſequence of which, and an order for that purpoſe, the commiſſioners ordered a dividend of 1 *s.* in the pound, to be paid out of the ſeparate effects of *Wooldridge*, and out of a moiety of the joint effects of *Wooldridge* and

Kelly; but refuſed to divide the other moiety of the joint effects, conceiving that their juriſdiction did not extend to it. A few months after, the aſſignees having received between 2 and 3000 *l.* more, another petition was preſented for the purpoſe of obtaining Lord Chancellor's order for the diviſion of the whole, which came on to be heard in *January* 1789, when his Lordſhip being of opinion, that he could not make ſuch order on a petition, recommended that a bill ſhould be filed, and diſmiſſed the petition. In conſequence of this the preſent bill was filed 31ſt of *January* 1789, and after ſeveral delays and anſwers put in, exceptions taken, *&c.* final anſwers came in 20th *January* 1790, by which they admitted the ſums come to their hands, but with reſpect to the uſes made of them from time to time, (which was particularly interrogated to in the bill) *Garratt* admitted the money in his hands had been lent to his partners, and that he was paid intereſt for it at 5 *per cent.* to the amount of 695 *l.* 11 *s.* 9 *d.* *Rowlatt* ſaid he had alſo lent the money he received to his partnerſhip, but had been paid no intereſt for it. After the original bill filed, *Kelly* died, leaving his ſiſter Mrs. *Wooldridge*, (the widow of *Wooldrige*, who was alſo dead) his neareſt relation, who adminiſtered

miniſtered to him; and the bill being amended, and ſhe made a party, by her anſwer claimed the property in queſtion, as his repreſentative, and alſo as a bond creditor. The cauſe coming on to be heard in *Michaelmas* term 1790, Mr. *Hardinge* for the plaintiffs: There are two queſtions.

1. Whether the aſſignee can compel the adminiſtratrix to pay the joint eſtate to them?

2. Whether a ſeparate bond creditor can come in before the joint creditors are paid?

In the preſent caſe the joint eſtate has been applied by the aſſignees for their own benefit. This is a clear ground for intereſt at the uſual rate: for it has been determined, that wherever truſtees have made uſe of truſt money, they ſhall pay intereſt for it at the uſual rate; without reference to what intereſt they have actually made: and the delay uſed in this caſe will be a ſufficient reaſon for the defendants to pay the coſts. The aſſignees objected to any dividend beyond the moiety of the joint effects; the bill prays a diviſion of the whole fund.

Here

Here is a joint fund got into the hands of ſeparate aſſignees; out of whoſe hands it cannot be taken, but by the joint creditors. Mrs. *Wooldridge* claims it for the purpoſe of paying *Kelly*'s ſeparate creditors; ſo that it is a queſtion between the joint and ſeparate creditors. It ſo happens that one of the ſeparate creditors is adminiſtratrix; but the only effect that can have, is between her and the other ſpecialty ſeparate creditors. Then it is *Kelly*, by his adminiſtratrix, claiming againſt the joint creditors. What is a partnerſhip? Partners are joint tenants of the joint fund; the conſequence is, that one can retain the whole fund; the one has no claim on the other but upon the ſettlement of accounts. *Fox* v. *Hanbury*, *Cowp.* 448. *Smith* v. *De Silva*, *Cowp.* 469. Suppoſe *Wooldridge* had paid the joint debts out of the fund, *Kelly* could not have recovered but on an account. As between a ſurviving partner and the repreſentative of the deceaſed partner, the ſurvivor at law has the whole right, though he is a truſtee; but he acts fairly if he pays all the joint debts, and pays over a moiety of the ſurplus. Here the aſſignees are tenants in common of one moiety, and, by chance, they have the other moiety in their poſſeſſion, but they muſt

pay

pay it to the joint creditors, as appears by the principles laid down in *Weſt* v. *Skip*, 1 *Vezey* 242. There is no caſe in the books in point with this, but the principle is laid down in ſeveral caſes. In *Goſs* v. *Dufreſnoy*, ſtated 1 *Cooke*'s Bankrupt Law 289. the partnerſhip debts were ordered to be firſt paid. Mr. Solicitor General and Mr. *Mansfield* (for the aſſignees). The commiſſion was, to all intents, a ſeparate commiſſion, but joint debts were proved under it. *Kelly*'s moiety of the joint fund is a fund not to be diſtributed under the bankruptcy. If *Kelly* had received the moiety, and paid ſeparate creditors with it, the payment would be good. There is a real difficulty, in this caſe, as to *Kelly*'s moiety of the fund. The aſſignees have diſtributed the moiety among the creditors, but did not think themſelves entitled to diſtribute the remaining moiety during *Kelly*'s life. It was *Kelly*'s money in their hands, and he could not have made them pay intereſt, as they were only his ſimple contract creditors. They were perſons not intereſted (being not even creditors) appointed by the creditors to get in the fund, and have kept the money by neceſſity; they ought not, therefore, to pay intereſt: and as the ſuit was made neceſſary by the doubts entertained, they ſhould not pay coſts.

coſts. Mr. *Graham* riſing on behalf of Mrs. *Wooldridge*, the adminiſtratrix, Lord Chancellor ſtopped him, ſaying, that the point would be reſerved to him, whether the ſeparate creditors were firſt to be paid out of the moiety before the joint creditors. His Lordſhip ſaid, that where one partner is ſolvent, and the other bankrupt, the aſſignees can do no juſtice without dividing the joint eſtate among the joint creditors; for they are joint tenants of the whole, if they can get it in. It was referred to the Maſter to take an account of the joint eſtate of *Wooldridge* and *Kelly*, and of the ſeparate eſtate of *Wooldridge* come to the hands of the defendants the aſſignees, and to the hands of the defendant *Suſannah Wooldridge*, as adminiſtratrix of *Kelly*, and to enquire whether the reſpective partnerſhips of the defendants *Garrat* and *Rowlatt*, had paid them any intereſt for ſuch parts of the eſtate of *Wooldridge* and *Kelly* as came to their hands; and that they ſhould be charged with ſuch intereſt, and that the Maſter ſhould compute intereſt at 4 *per cent.* on the reſt of the money which came to their hands from the time of their receiving the ſame; and the Maſter was to enquire what creditors had ſought relief under *Wooldridge*'s commiſſion, and which of them were joint creditors, and whether

whether any of the joint creditors had not proved, and his Lordſhip declared, that the joint creditors of *Wooldridge* and *Kelly* were to be conſidered as creditors on their joint eſtate, and that the aſſignees ſhould pay the 3176 *l.* 14 *s.* 4 *d.* admitted to be in their hands, into the bank, and the ſame ſhould be laid out in truſt in the cauſe; and reſerved further directions, till the Maſter ſhould have made his report. Upon the 29th *November*, the Maſter made his report, and thereby certified, that he had taken the accounts as directed; and that it was admitted before him, that there had come to the hands of defendants *Garratt* and *Rowlatt*, of the joint eſtate of *Wooldridge* and *Kelly* (including a ſum of 450 *l.* 18 *s.* 5 *d.* ariſing from the ſeparate eſtate of *Wooldridge* as after mentioned) the ſum of 6764 *l.* 1 *s.* 5 *d.* and that they had expended, on account of the joint eſtate, ſums amounting to 3199 *l.* 13 *s.* 2 *d.* which left a reſidue in their hands of 3564 *l.* 8 *s.* 3 *d.* and that it was admitted, there had come to their hands of the ſeparate eſtate of *Wooldridge* the ſum of 450 *l.* 18 *s.* 5 *d.* which made part of the money received by the defendants from *Pope* and *Hawkins*, the former aſſignees of *Wooldridge*, and which had been divided among the creditors who had proved under

Wooldridge's commiſſion, and that there was not any thing remaining in the hands of the defendants *Garratt* and *Rowlatt*, of the ſeparate eſtate of *Wooldridge*, except five treaſury orders of 100 *l.* each, bearing an intereſt of 3 *l.* 10 *s.* *per annum*, taken in purſuance of the acts for giving relief to *American* ſufferers, to *Suſannah Wooldridge*, and the defendants *Garratt* and *Rowlatt*, jointly; and that the defendant *Suſannah* had not in her poſſeſſion any part of the joint or ſeparate eſtate. He then found that defendants *Garratt* and *Rowlatt*, had on the 15th *March* 1791, paid the ſum of 3166 *l.* 16 *s.* 4 *d.* into the bank, (which had been laid out in the purchaſe of 3897 *l.* 12 *s.* 6 *d.* Bank 3 *per cent.* annuities), and which being deducted out of the balance in their hands, the ſame was reduced to 397 *l.* 11 *s.* 11 *d.* and it was admitted before the Maſter, that the partnerſhip in which the defendant *Garratt* was concerned, had paid him intereſt for ſuch part of the joint eſtate of *Wooldridge* and *Kelly*, as had come to his hands, 695 *l.* 10 *s.* 9 *d.* which was all the intereſt made by defendant *Garratt*, of the joint eſtate, at the time of paying the money into the Bank; and that the defendant *Rowlatt* had been paid, from the co-partnerſhip in which he was concerned, for intereſt on

ſuch

ſuch part of the joint eſtate as had come to his hands, 309 *l.* 19 *s.* 10 *d.* which was all the intereſt made by him, at the time of the payment made into the Bank; and he certified that he had computed intereſt on the remaining ſum of 397 *l.* 11 *s.* 11 *d.* the balance in the hands of defendants *Garratt* and *Rowlatt*, from the 3d *March* to the 29th *November*, and the ſame amounted to 11 *l.* 14 *s.* 8 *d.* and that he had, in the 3d ſchedule to his report, ſet forth an account what joint creditors had proved under *Wooldridge*'s commiſſion, and the ſum proved by each, and the dividend paid to each, and that one perſon only who had not before proved, *Andrew Verrier*, had come in before him, and proved a joint debt of 22 *l.* 19 *s.* 6 *d.* and that no ſums of money (except the dividends) had been received by the ſaid joint creditors.

The cauſe came on for further directions on the Maſter's report, on the 8th *February*, before Mr. Juſtice *Buller*, ſitting for the Lord Chancellor, when Mr. *Graham* ſhortly argued on the part of Mrs. *Wooldridge*, that ſhe was entitled to a priority with reſpect to the ſecond moiety of the joint eſtate; and that the aſſignees could only divide one moiety among the joint creditors. But Mr. Juſtice *Buller* thought

thought the assignees must administer all the joint assets in payment of the joint creditors, and that Mrs. *Wooldridge* had no priority against them, and, therefore, referred it back to the Master to tax all parties their costs, and ordered the 3897 *l.* 12 *s.* 6 *d.* standing in the name of the Accountant General, in trust in the cause, to be sold, and that the money to arise from the sale, together with the cash in the Bank, and the interest upon the 3897 *l.* 12 *s.* 6 *d.* until the sale, should be paid to the defendants *Garratt* and *Rowlatt* the assignees, who were to apply the same, together with the 1408 *l.* 17 *s.* 2 *d.* reported due from them, in payment, first of the costs, and then to divide the residue *pari passu* among the creditors named in the third schedule to the Master's report, and to *Andrew Verrier*, a creditor who had proved a debt before the Master; and, by consent, it was ordered that the five debentures mentioned in the report to be in the hands of the assignees, should be delivered up to the defendant *Susannah Wooldridge*.

And after a dissolution of partnership, the *right* in law and justice which one partner has against another, according to the *dictum* of Lord *Mansfield* [m], "clearly is not to change

[m] Cowp. 449.

"the

"the poſſeſſion, or to make an actual divi-
"ſion of ſpecific effects." One partner may be a creditor of the partnerſhip to ten times the value of all the effects.

The other partner in that caſe can only have a right to an account of the partnerſhip, and to the balance due to him, if any, on that account. For no perſon deriving under the partner can be in a better condition. And, if one of two partners become bankrupt, the ſolvent partner may, if for a valuable conſideration and *without fraud*, diſpoſe of the *partnerſhip* effects; and if *he* afterwards fail, the aſſignees under a *joint* commiſſion againſt *both*, cannot maintain *trover* againſt the *bonâ fide* vendee of ſuch partnerſhip effects. Thus in the caſe of *Fox et al'* aſſignees v. *Hanbury et al'* [n] where upon a rule to ſhew cauſe why the arbitrator named in an order of *Niſi Prius* made in this caſe, ſhould not be directed to ſettle, in his award, the account of the conſignments of tobacco to the defendants, proved on the trial, from the time of the bankruptcy of *Thomas How Ridgate*; the caſe, as reported and ſtated by Lord *Mansfield*, appeared to be as follows:

[n] Cowp. 445.

This was an action of trover brought by the plaintiffs as aſſignees under a joint commiſſion of bankrupt, taken out againſt *John Barnes* and *Thomas How Ridgate*, bankrupts, to recover 4000 hogſheads of tobacco. The declaration conſiſted of two counts: one charging the trover and converſion to be before either of the bankrupts had committed an act of bankruptcy: the other charging it, ſubſequent to an act of bankruptcy committed by both the bankrupts.

Barnes and *Ridgate* were partners; *Ridgate* lived in *England*, and *Barnes* lived in *Maryland*.

Ridgate was under very large acceptances, and much preſſed for money. To ſupport his credit *Hanbury* agreed to pay, and actually did pay, ſeveral bills for him.

But with a view to better carrying on the buſineſs, *Ridgate* was to go to *Maryland*, and *Barnes* was to come to *England*; *Hanbury* interpoſed his credit, upon the confidence of conſignments of tobacco being made to him, which would be a pledge for the monies he advanced.

Ridgate

Ridgate told his clerk that he was going to *Maryland*, and that *Barnes* would come over to *England*; but bid him ſay, the day he ſet out, that he was gone to *Hanbury*'s country houſe, and would return ſoon. *Mauduit* a creditor called, and had that anſwer. *Ridgate* went to *Maryland*, and *Barnes* came to *England*. No umbrage was taken by the creditors at this exchange of the reſidence of the two partners: neither *Ridgate*, *Barnes*, or *Hanbury* had an idea that this exchange of reſidence was an act of bankruptcy. There was no intention to commit an act of bankruptcy.

Conſignments of tobacco were made by *Barnes* to *Hanbury*, before *Barnes* left *Maryland*, and there were other conſignments afterwards. Upon the 22d of *January* 1773, *Barnes* after returning to *England* committed an act of bankruptcy, and afterwards publickly failed. Then and not before, the creditors ſet up *Ridgate*'s going to *Maryland* as an act of bankruptcy by him, and they took out a joint commiſſion againſt both: and the plaintiffs, in the capacity of aſſignees under the commiſſion, brought the preſent action.

Whether *Ridgate*'s going to *Maryland*, under the particular circumſtances before-mentioned, ſhould be conſtrued an act of bankruptcy, was a queſtion much litigated at the trial. The jury upon the miſrepreſentation to *Mauduit* before-mentioned, were of opinion it was; and accordingly found him a bankrupt upon the 15th of *July* 1772, the day on which he left *London*. No fraud or want of conſideration was fixed upon *Hanbury*. But the plaintiffs inſiſted, that all the conſignments after the 15th of *July* 1772, were void. The defendants inſiſted, that all the conſignments before the 22d of *January* 1773, were good. There were conſignments after the 22d of *January* 1773, which the defendants could not ſupport; and therefore as to them, an account was neceſſarily to be taken of the value of the tobacco, which ſo came to the hands of the defendants, after making juſt allowances. That account was referred to an arbitrator; and the queſtion, whether the plaintiffs were entitled in this action, to recover the whole of the value of the conſignments made by *Barnes* between the 15th of *July* 1772, and the 22d of *January* 1773, or a moiety thereof, was ſubmitted to the opinion of the Court: and accordingly to ſuch opinion, ſuch conſignments are to ſtand or fall,

fall, and to be brought into, or left out of the account, by the arbitrator.

This case was argued twice, first in *Hilary* Term last by Mr. *Wallace* and Mr. *Buller* for the plaintiffs, and Mr. *Mansfield* and Mr. *Dunning* for the defendants. The Court then ordered it to be argued by one counsel on each side, this Term. It was accordingly argued by Mr. *Buller* for the plaintiff, and Mr. *Mansfield* for the defendant.

Mr. *Buller* for the plaintiffs insisted, 1st, That the consignments were fraudulent, being with a view to give the defendants a preference, and therefore void for the whole. 2dly, If not void for the whole, the plaintiffs were at least entitled to a moiety: for by the bankruptcy of *Ridgate*, the partnership was immediately dissolved; and so it was held by Lord *Mansfield* and *Yates* Justice, in the case of *Hague* and others, assignees of *Scott* against *Rolleston*, 4 *Bur.* 2174. If so, *Barnes*, the solvent partner, had no longer a power over the whole, but each had his own moiety only to give or grant. If an execution issue against one of two partners, the Sheriff, though he may seize the whole, can only sell an undivided moiety. *Heydon* v. *Heydon*, 1 *Salk.* 392.

By the ſame rule, a bankruptcy ſevers from the time; for a bankruptcy is an execution in the firſt inſtance. From the moment, therefore, that *Ridgate* failed, the power of *Barnes* to bind the whole of the partnerſhip effects ceaſed; conſequently, the plaintiffs were entitled to a moiety.

Mr. *Manſfield* for the defendant, *contra*, contended, that the plaintiffs could not recover on either count. For if the goods were the property of both the partners, as alleged in the firſt count, each had a right to diſpoſe of the whole; and the conſignment by one partner was the conſignment of both. That here there was not even a ſuggeſtion of fraud; and conſequently no ground of action to entitle them to recover upon that count. As to the 2d count, he argued that the bankruptcy of one partner was not to all purpoſes a diſſolution of the partnerſhip. But ſuppoſing it were, and that the aſſignees became entitled to an undivided moiety, they ſhould in that caſe have declared as the aſſignees of *Ridgate* only, not as the joint aſſignees of both the partners. But even in that ſhape, the action could not have been maintained; for then the aſſignees and the ſolvent partner would have been tenants in common, and

trover

trover or detinue does not lie by one tenant in common of chattels perſonal againſt another. *Litt. ſect.* 323. Therefore the plaintiffs had no title to recover.

Lord *Mansfield.* The ſingle queſtion is, Whether the act of the ſolvent trader for a valuable conſideration, is good, after an act of bankruptcy committed by his partner, without his knowledge, and without the leaſt colour or mixture of fraud. Whether the aſſignees can, in ſuch a caſe, come againſt the *bonâ fide* conſignee of the ſolvent partner, to recover the value of the goods conſigned. The aſſignees ſtand in the place of the bankrupt, and can in no caſe be in a better ſituation than the bankrupt himſelf would have been in, under the ſame circumſtances. Suppoſe in this caſe, the partnerſhip had been diſſolved, and the tobacco had been in the poſſeſſion of *Barnes*, what action could *Ridgate* have had againſt theſe goods ſpecifically? Would he have been entitled to any thing but the balance of the account?

Cur. adviſare vult.

Afterwards Lord *Mansfield*, having ſtated the caſe *(ut antea)* delivered the opinion of the Court as follows:

The queſtion for the opinion of the Court is a general one: whether aſſignees, under a joint commiſſion againſt two partners, taken out after the bankruptcy of both, can maintain an action of trover againſt a perſon in poſſeſſion of goods, under a ſale or conſignment *bonâ fide*, for a valuable conſideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himſelf, but after an act of bankruptcy committed by the other partner.

An act of bankruptcy by one partner, is to many purpoſes a diſſolution of the partnerſhip, by virtue of the relation in the ſtatutes, which avoid all the acts of a bankrupt from the day of his bankruptcy; and from the neceſſity of the thing, all his property being veſted in the aſſignees, who cannot carry on a trade.

In the caſe of *Hague* v. *Scott*, *Hil.* 8 *Geo.* 3. B. R. cited by Mr. *Wallace* and Mr. *Buller*, it was held, that the ſtatutes concerning bankrupts made an intire, not a partial avoidance of the bankrupt's acts, as well in reſpect of his partner's moiety, as his own. But no caſe has been cited, where a ſecret act of bankruptcy

ruptcy by one partner, has been held to avoid an honeſt conveyance of partnerſhip effects by the other. Each has a power ſingly to diſpoſe of the whole of the partnerſhip effects.

There are no words in the ſtatute expreſsly applicable to this caſe: and there is great reaſon why they ſhould be avoided. If partners diſſolve their partnerſhip, they who deal with either, without notice of ſuch diſſolution, have a right againſt both. After a diſſolution by agreement, by an execution, or by a bankruptcy, the partner out of poſſeſſion of the partnerſhip effects, has the ſame lien on any new goods bought in, which he had upon the old. But ſuppoſing that a ſecret act of bankruptcy of one partner is a compleat diſſolution of the partnerſhip, and that from that moment the aſſignees and the ſolvent partner are to be conſidered as tenants in common of the partnerſhip effects; the queſtion will ſtill remain, whether the plaintiffs have any right to recover in this action.

This leads me to conſider what right in law and juſtice one partner has againſt another, after a diſſolution of the partnerſhip.—It clearly is not to change the poſſeſſion, or to make

make an actual diviſion of ſpecific effects. One partner may be a creditor of the partnerſhip to ten times the value of all the effects. The other partner in that caſe can only have a right to an account of the partnerſhip, and to the balance due to him, if any, on that account. No perſon deriving under the partner can be in a better condition. His executor ſtands exactly in the ſame light. It is the very text of *Littleton*. In *ſect.* 321. he ſays, "If there be two tenants in common "of a perſonal chattel, and one dies, the ex- "ecutors ſhall hold and occupy with the ſur- "vivor, as their teſtator did before he died." If a creditor takes out execution againſt one partner, as in 1 *Salk.* 392. the vendee would be tenant in common. And in the caſe of *Skip* v. *Harwood*, in Chancery, 6th *July* 1747, Lord *Hardwicke*, according to my note, ſays, "If a creditor of one partner takes out exe- "cution againſt the partnerſhip effects, he "can only have the undivided ſhare of his "debtor; and muſt take it in the ſame "manner the debtor himſelf had it, and ſub- "ject to the rights of the other partner."

The aſſignees under a commiſſion of bankruptcy againſt one partner, muſt be in the ſame ſtate. They can only be tenants in common

common of an undivided moiety, ſubject to all the rights of the other partner. This is clearly laid down in that caſe of *Skip* v. *Harwood*, which is tolerably well reported in 1 *Vezey* 239*. And I refer you to that report, to avoid taking up ſo much time as would be neceſſary to ſtate it from my own notes.

My general memory of the principles explained in that caſe, and the ſtrong ſenſe upon which this propoſition is founded, that one partner can have no right againſt the other, but to what is due from him after making him all juſt allowances, induced me without heſitation, to declare my opinion at the trial, that the conſignments endorſed by *Barnes* before the 22d of *January* 1773, the day *Barnes* became a bankrupt, could not be avoided by the plaintiffs, either for the whole or a moiety, on account of the bankruptcy of *Ridgate*. But the matter being of value, and no precedent cited, I wiſhed them to take the opinion of the Court.

When it was firſt argued, the defendant's counſel ſaid little or nothing, expecting to re-

* It is there reported under the title of *Wiſt* v. *Skipp*.

ply;

ply; which raiſed doubt enough to make us order it to be put in the paper. Now, that it is fully underſtood, we are all clearly of opinion, that the action cannot be maintained.

Suppoſing the indorſement by *Barnes* of the bills of lading not to bind the undivided moiety of the aſſignees, which is the utmoſt the plaintiffs can contend for; then, this is an action of trover, by one tenant in common againſt another, which cannot be. The text of *Littleton* ſays ſo; *Coke*'s Comment ſays ſo; the Adjudged Caſes ſay ſo; and there is no judgment or *dictum* to the contrary. The text of *Littleton*, *ſect.* 323. is as follows: "But if two be poſſeſſed of chattels perſonal "in common, and one take the whole to "himſelf, out of the poſſeſſion of the other, "the other has no remedy but to take this "from him, who hath done the wrong, to "occupy in common, &c. when he can ſee "his time, &c."

Lord *Coke*, in his Comment on this paſſage, 200. *a.* ſays, "If one tenant in common "takes all the chattels perſonal, the other "has no remedy by action; but he may take "them again."

So

So in *Brown* v. *Hedges*, *Trin.* 7 *Ann.* B. R. 1 *Salk.* 290. Upon a caſe made for the opinion of the Court, the ſecond point reſolved was this: "One joint-tenant, tenant in com-"mon, or parcener, cannot bring trover "againſt another, becauſe the poſſeſſion of "one, is the poſſeſſion of both; if he does, "it is good evidence, upon not guilty: But "if one joint-tenant bring trover againſt a "ſtranger, in that caſe the defendant may "plead it in abatement, but cannot take ad-"vantage of it in evidence." The reaſon is unanſwerable; there is no converſion.

Upon theſe authorities, we are of opinion that the action cannot be maintained; and conſequently, that the conſignments prior to the 22d of *January* 1773, are not to be brought into the arbitrator's accounts.

Where one partner takes out more money from the partnerſhip ſtock than his ſhare amounted to, the other has a *right* to come upon the ſeparate eſtate of that partner *pro tanto*.

Thus in a matter *ex parte Drake* P, *Dec.* 20th, 1735, before Lord *Talbot*, where there

P Cited 1 Atk. 225. 2 Ch. Rep. 226. S. P. 16 Vin. Abr. 242. pl. 3.

were two partners, and one had taken out more money from the partnerſhip ſtock than his ſhare amounted to, and therefore became a debtor for ſo much; and my Lord *Talbot* was of opinion, that the partnerſhip creditor had a right to come upon the ſeparate eſtate of the partner who was ſo indebted.

So in a matter *ex parte Blake*, 20th *December* 1735. It appeared that *Lavington* and *Paul* entered into partnerſhip by indentures dated the 24th of *May* 1725, which continued till *December* 1727, when they executed new indentures of co-partnerſhip, dated the 21ſt of the ſame month, and continued therein till the 5th of *September* 1733, when they failed and became bankrupts. The bankrupts, from the time of the firſt partnerſhip deed, home to their failure, had ſeverally conſtant recourſe to the caſh belonging to the joint ſtock, and *Lavington* had taken thereout, for his own uſe, at ſeveral times during the partnerſhip, 3271 *l.* 18 *s.* 8½ *d.* the intereſt whereof had been computed to amount to 629 *l.* 8 *s.* 2½ *d.* *Paul* had taken out of the ſaid joint ſtock, for his own uſe, at ſeveral times within the ſame time, 2296 *l.* 5 *s.* 7½ *d.* the intereſt whereof had been computed to amount to 388 *l.* 13 *s.* 6 *d.* and at the ſame time the bank-

bankrupts had paid intereſt for more money, which they borrowed for carrying on their trade, than the ſums detained and taken out by them reſpectively amounted to.

The bankrupts were indebted by means of their joint trade ſeveral thouſand pounds more than they were able to pay. The ſums taken, or near the whole thereof, were afterwards entered into their partnerſhip books, to which each of them had free reſort, but there was no conſent in writing by either of them to take out either of the ſums, for each of them took what he thought proper, without diſtinguiſhing whether any part was ſo taken out as his weekly allowance, according to agreement, and without aſking the conſent of his partner, but each was, by the ſaid books, made privy to the ſums drawn out. The petition prayed that the joint creditors might be admitted creditors on the ſeparate eſtates reſpectively, for ſuch ſum or ſums of money, in reſpect of their above demands, as ſhould ſeem proper.

The order recites, that it appearing by the ſaid indentures of co-partnerſhip, that *Levington* was entitled to two thirds of the ſaid

ſaid joint ſtock, and *Paul* but to one third thereof, and it alſo appearing by the ſaid ſtate of facts that the ſaid *Paul* did take out of the caſh and ſtock belonging to the ſaid partnerſhip, conſiderably more in proportion than was taken thereout by *Lavington*, it was thought that *Paul* ought to be conſidered as debtor to the eſtate in partnerſhip between *Lavington* and himſelf, for ſo much as he took out of the joint ſtock more than was taken out in proportion by *Lavington*, regard being had to their reſpective intereſts in the ſaid partnerſhip eſtate, and that the ſeparate eſtate of *Paul* ought to be conſidered as indebted to the joint eſtate of *Lavington* and *Paul* for the ſame, and the intereſt thereof. And it was referred to the maſter to eſtimate and compute how much the groſs ſum, in the ſaid ſtate of facts mentioned to be taken out of the ſtock in partnerſhip by *Paul*, regard being had to his ſhare and intereſt in the ſaid partnerſhip, exceeded in proportion the groſs ſum thereby certified to be taken out of the ſaid partnerſhip ſtock by *Lavington*, regard being had to his ſhare and intereſt in the ſaid joint ſtock; and for what the ſaid maſter ſhould find to be the exceſs ſo taken out by *Paul*, and for ſuch proportion of the intereſt in the ſaid ſtate of facts mentioned and computed

puted to have incurred upon the whole ſum thereby ſtated to be taken out of the ſaid joint ſtock by *Paul*, as ſuch exceſs bears to the whole ſum ſo ſtated to be taken out by *Paul* (which intereſt was alſo to be aſcertained by the ſaid maſter) the aſſignees, under the ſaid joint commiſſion awarded againſt *Lavington* and *Paul*, were to be admitted creditors under the ſaid ſeparate commiſſion awarded againſt *Paul*, and to be paid a dividend or dividends in reſpect thereof out of his ſeparate eſtate, remaining in the hands of the aſſignees under ſuch ſeparate commiſſion, in equal proportions with the other ſeparate creditors of the ſaid *Richard Paul*.

But in a ſubſequent caſe [q] before Lord *Thurlow*, he very much conſidered the queſtion, and finally determined that the aſſignees on behalf of the joint eſtate could not prove againſt the ſeparate eſtate, unleſs the partner had taken the joint property with a fraudulent intent to augment his ſeparate eſtate.

Therefore where *Fendall* was a dormant partner with *Lodge*, and *Lodge* took out mo-

[q] Ex parte Gull. Exch. Mayne and Graham, 4th Auguſt 1790.

ney from the partnerſhip to a conſiderable amount, without the knowledge of *Fendall*[r], who did not intermeddle in the partnerſhip buſineſs, Lord *Thurlow*, after taking time to conſider, thought he could not permit the aſſignees under a joint commiſſion, to prove againſt the ſeparate eſtate of *Lodge*, without deciding upon a principle that muſt apply to all caſes, and conſtantly occaſion the taking an account between the partners and the partnerſhip in every joint bankruptcy. He ſaid, that if the affidavits had gone the length of connecting the bankruptcy with the inſtitution of the partnerſhip trade, and that *Lodge*, with a view of ſwindling *Fendall* out of his property, had got him into the trade, and then taken the effects of the partnerſhip into his own hands, with a view to his ſeparate creditors, it might have been different. The petition on the part of the joint creditors to prove againſt the ſeparate eſtate was diſmiſſed.

Where partners become bankrupts, the allowance is to be divided between them, in the proportions in which the ſurplus of their reſpective ſeparate effects, and their reſpec-

[r] Ex parte Batſon, 20th Jan. 1791.

tive

tive proportions of the joint fund, have contributed to the payment of the joint debts.[s]

And partners can have but one allowance in reſpect to their joint and ſeparate eſtate.

Thus in a matter *ex parte Bate*.[t] A joint commiſſion of bankrupt iſſued againſt the petitioner and *Tilman Henkell*. The joint debts amounted to 22,796*l*. 13*s*. 6*d*. The joint effects to about 5000*l*. The ſeparate effects of the petitioner amounted to about 30,000*l*. The debts proved upon his ſeparate eſtate were 15,894*l*. but of that ſum 15,362*l*. 7*s*. 7*d*. were in fact debts due from the partnerſhip, but as the creditors were joint and ſeveral, they thought proper to come in upon the ſeparate eſtate of the petitioner, as being the moſt ſolvent eſtate. *Henkell*'s ſeparate effects, after paying his ſeparate creditors, were about 1,700*l*. The joint creditors were paid 16*s*. in the pound, of which (ſuppoſing the joint effects to be divided into moieties) the petitioner had contributed in the proportion of 12*s*. 6*d*. and *Henkell* of 3*s*. 6*d*.

[s] Cooke's B. L. 593.

[t] Ex parte Bate, June 23d, 1785.

Under theſe circumſtances *Bate* petitioned, that the aſſignees might pay him his allowance of 10 *l. per cent.* not exceeding 300 *l.* in reſpect of the ſeparate eſtate, according to the ſtatute of 5 *Geo.* 2. *c.* 30. and that he might alſo have ſuch allowance in reſpect of the joint eſtate as the Court ſhould think fit.

The firſt queſtion was, whether it was poſſible for the ſame perſon to have a double allowance, one in reſpect of the joint and the other of the ſeparate effects; but the Lord Chancellor was clearly of opinion that could not be. But the principal queſtion made was, whether, under the circumſtances of this caſe, *Henkell* was entitled to any allowance, and if ſo, whether it was to be a part of the 300 *l.* to which the petitioner *Bate* made claim, or whether the ſtatute intended a diſtinct allowance of 300 *l.* to each partner, when the joint creditors received 15 *s.* in the pound.

His Lordſhip declared, that the bankrupts were entitled to the ſum of 300 *l.* being one allowance only of 10 *l. per cent.* in reſpect of their joint and ſeparate eſtates, and that the ſame ought to be divided and paid to

and between the bankrupts, according to the proportion which the ſurplus of each of their ſeparate eſtates, after payment of their reſpective ſeparate debts, and their reſpective moieties of their joint eſtates have contributed to the payment of their joint debts.

And one partner may maintain an action for money had and received againſt the other partner for money received to the ſeparate uſe of the former, and wrongfully carried to the partnerſhip account. And where money is owing to two partners, and after the death of one, it is paid to a third perſon, the ſurviving partner may maintain an action for money had and received in his own *right* and not as ſurvivor. Thus in the caſe of *Smith* v. *Barrow*.[u] Where the plaintiff and *Robert Smith* his father had been in partnerſhip together, during which time one *Keate* became indebted to them in 531 *l*. *Robert Smith* died, leaving the plaintiff his ſole executor. After the death of his father the plaintiff took the defendant into partnerſhip, and *Keate* became indebted to theſe two in the further ſum of 30 *l*.

He afterwards became much involved, and his effects were transferred to certain truſtees

[u] 2 Term Rep. 476.

for the benefit of his creditors. Two payments were made in the courſe of diſtribution at different times. The firſt, which was made to theſe parties (the plaintiff and defendant) was divided between them according to their ſeveral proportions; that is, the proportion of the former debt of 531 *l.* to the plaintiff's ſeparate uſe, and the proportion of the 30 *l.* in moieties between them. After this the truſtees tranſmitted a bill of exchange to the plaintiff and defendant, in their joint names, and the defendant alone received the money, under the title of *Smith* and *Barrow*. The plaintiff's proportion of this ſecond dividend, ſo far as related to his original debt, was 79 *l.* 14 *s.* 6 *d.* for which this action for money had and received was brought. A rule was obtained to ſhew cauſe why the verdict, which had been given for the plaintiff, ſhould not be ſet aſide, and a nonſuit entered, on two grounds; firſt, that the action ought to have been brought by the plaintiff as executor or ſurviving partner. 2dly, That the remittances being made to *Smith* and *Barrow*, it appears to have been received on a partnerſhip tranſaction, and one partner cannot maintain his action againſt another, becauſe a receipt by one is a receipt by both.

Bower and *Morgan*, who ſhewed cauſe againſt the rule, anſwered the firſt objection by obſerving that the right of action did not accrue againſt the defendant till after the death of the teſtator and partner, becauſe the money was not received by him till afterwards. And as to the ſecond ground, that the proportions of money due to either were very well ſettled, and indeed had been admitted by the defendant himſelf upon the former ſettlement; and the facts clearly ſhewed that as to the plaintiff's proportion in reſpect of the former debt due from *Keate*, it could not have been received by the defendants on account of the partnerſhip ſubſiſting between him and the plaintiff, and therefore *quoad* ſuch ſum they were like any other two indifferent perſons, and not as partners; and if ſo the action might well be maintained.

Bearcroft and *Ruſſell*, in ſupport of the rule, ſaid that the firſt objection was taken for the purpoſe of enabling the defendant to ſet off any debt which he might have been entitled to, had the action been brought in another form. But ſuppoſing that not to be a ſufficient ground of objection, they contended that the next was well founded: it

lay on the plaintiff to make out the propoſition that the money had been received to his uſe by the defendant. Now the evidence expreſsly contradicts any ſuch idea. The remittance was made to the partnerſhip; it was an *entire payment* and an entire tranſaction. The money was received by the defendant as a *partner*; he was jointly entitled to receive it with the plaintiff in that character, when received, it made an *item* in the partnerſhip account if any miſtake had been made in the bill which was tranſmitted and the party tranſmitting it had paid too much, he muſt have brought the action againſt the *partnerſhip* for the ſurplus, and their joint ſtock would have been anſwerable to him. If ſo, then it falls under the common rule, that one partner cannot maintain an action for money had and received againſt another, and that rule which is founded in reaſon ought to be extended to this caſe; for ſuppoſing that on the whole of their dealings in partnerſhip the plaintiff ſhould be indebted to the defendant this latter will be precluded from ſetting off his debt.

Aſhburſt J.—As to the firſt objection, that this action ſhould have been brought either as executor, or as ſurviving partner, the ſame anſwer

anſwer may be given to both. Where the money is received after the death of the teſtator, the executor may declare either in his own right, or as executor, becauſe the teſtator never had a ſpecific cauſe of action to recover that ſum againſt the party receiving it, and therefore he may declare in his own name; neither would he ſhelter himſelf from the coſts as executor, if he were to fail, where he might have brought the action in his own name, the ſame anſwer may be given to the objection that this action ſhould have been brought as ſurviving partner; becauſe this ſpecific ſum was never received by him as partner. The partnerſhip was before put an end to by the death of the other partner; neither is there any foundation for the ſecond objection; the two ſums belonging reſpectively to the plaintiff, and to the partnerſhip account, were conſolidated merely for the convenience of the party making the remittance, but the ſum now claimed by the plaintiff did not belong to the partnerſhip account; and as the defendant has received a ſum of money belonging to the plaintiff alone, which he has wrongfully carried to the partnerſhip account, he is liable to refund it in this action.

Buller J.—I am of opinion not only that the action is properly brought but that it could not have been brought in any other form: In what character was the money received by the defendant? The former dividend was received and divided according to the proportions of the reſpective debts of the plaintiff, and of the plaintiff and defendant as partners, then on the receipt of the ſecond dividend by the defendant, it ſhould have been divided into two parts bearing the ſame proportion to each other as the ſeparate demand of the plaintiff on *Keate*'s eſtate, and the joint demand of the plaintiff and defendant. The plaintiff would have been ſolely entitled to the firſt part, and muſt have ſhared the other part with the defendant as due to the partnerſhip account, ſo that the firſt part of this ſum was money ſpecifically received by the defendant to the plaintiff's uſe. And if the action had been brought by the plaintiff as ſurviving partner, it would have been neceſſary for him to have ſhewn that he and the deceaſed partner had a cauſe of action againſt this defendant, but they never had any ſuch cauſe of action; and it is immaterial to look back to ſee how third perſons were concerned if as between the

plaintiff

plaintiff and the defendant, the latter has received a ſum of money for the uſe of the former. Then it has been ſaid that there could be no ſet-off in this caſe; but I am of a different opinion, for this is an action for money had and received, in which the plaintiff can only recover what is in juſtice due to him, therefore ſuppoſing any debt were due from the plaintiff to the defendant, it was for the advantage of the latter to bring the action in this form. With regard to the ſum of 30 *l.* due to this partnerſhip, I agree that this action cannot be maintained. *One partner cannot recover a ſum of money received by the other unleſs on a balance ſtruck that ſum be found due to him alone.* But this objection does not apply to the larger ſum in this caſe which is the one in diſpute.

Groſe J.—In anſwer to the firſt objection I am of opinion not only that this action may be maintained but for the reaſons mentioned by my brother *Buller*, that it could not have been brought in any other way; becauſe there never was a joint cauſe of action in the plaintiff and his late partner. The caſe of *Hyat* v. *Hare* [x] is nearly ſimilar to this, where *Holt* Ch. J. ſaid, "If there be two partners

[x] Comb. 383.

"in

" in trade and one of them buy goods " for them both, and the other dieth, the ſur- " vivor may be charged by *indebitatus aſſump-* " *ſit* generally without taking notice of the " partnerſhip or that the other is dead, and he " ſurvived." In that caſe the defendant was the ſurviving partner, but that makes no difference, for the reaſoning applies equally to this caſe. With reſpect to the other objection; it appears that the defendant has received a ſum of money partly on the plaintiff's account, and partly on the partnerſhip account, the former of which he wrongfully carried to the partnerſhip account, but that being his own act, and it being againſt the truth and juſtice of the caſe, I am of opinion that he ought not to be permitted to ſet up the partnerſhip as a defence to this action. Suppoſing that the plaintiff had received this money he would have been entitled to have ſet apart for his ſeparate uſe the whole ſum, except that part which belonged to the partnerſhip account: then the circumſtance of the defendant's having received it cannot alter the right.

Rule diſcharged.

And with ſuch ſcrupulous exactneſs do we find the *rights* of partners maintained upon

upon all occaſions in this country, that even a merchant-partner who has a ſeat in parliament ſhall not be ſuffered to ſhelter himſelf under the privilege of Parliament. For, by an order of the Houſe of Commons, with reſpect to partnerſhips, made on the 16th of *November* 1722, it was reſolved, that no co-partner in any trade or undertaking, is entitled to the privilege of Parliament.

Sir *George Caſwell* ſtanding up in his place, and acquainting the Houſe that he was willing to wave his privilege in the cauſe, wherein he was one of the defendants, depending in the court of Chancery, between him and *Alexander Urquhart*, Eſq; member of that Houſe, whoſe petition was referred to the Committee of Privileges, to enquire whether Mr. *Urquhart* would wave his privilege; and Mr. *Urquhart* declaring that he would not inſiſt on his privilege, it was ordered, "That the Committee of Privileges be diſcharged from proceeding on the petition of *Alexander Urquhart*, Eſq; complaining of Sir *George Caſwell*'s inſiſting upon the privilege of this Houſe, as he is *co-partner* with *Jacob Sawbridge* and *Elias Turner*."

Whereupon it was reſolved and declared, *nemine contradicente*, "That no co-partner in any

any trade or undertaking, is entitled to the privilege of this House, in respect of any matter relating to such partnership" y.

Thus having endeavoured to trace the *rights* of partners as between themselves, I shall next proceed to enquire how far they are implicated in each other's wrongs?

y *Veneris*, 16 November 1722.

CHAPTER IX.

How far Partners are to be considered as participes criminis, or are otherwise implicated in Wrongs done by each other.

AS probity and fair dealing are among the chief requisites in all partnership transactions, and as the partnership contract itself is founded on the very basis of reciprocal advantage, and mutual benefit, the moral obligation between the parties must hang in an even balance; consequently the only mode to preserve that balance is, for each individual to abstain from doing wrong in any matter relating to their joint concerns, because if either of them should engage in transactions of trade not consistent with this rule; as for example, if he should be guilty of trading on the joint account in contraband goods, or in any manner prohibited by law, the rest of the partners must be considered more or less implicated in such joint transaction.

And ſince partnerſhip is a contract invented by the Law of Nations [a], for the advancement, and oftentimes for the protection of fair and open trade; the judges of our courts in this country would not ſuffer an action to be maintained by ſeveral partners for goods ſold by one of them living in *Guernſey*, and packed by him in a particular manner for the purpoſe of ſmuggling, though the other partners who reſided in *England*, knew nothing of the ſale; for it is a contract by ſubjects of this country, made in contravention of the laws: and ſuch a caſe muſt be conſidered in the ſame light with reſpect to the whole firm as if all the partners had lived in *England*: And the place where the contract of ſale was made, did not alter the nature of the contract, ſo as to prevent the law from attaching upon it as contraband, and therefore not proper to be enforced or affirmed.

Thus in the caſe of *Biggs* and others v. *Lawrence* [b], where upon a rule to ſhew cauſe why there ſhould not be a new trial, in a cauſe tried before *Buller* J. in *Cornwall*; the learned Judge reported that this was an action

[a] *Societas contractus juris gentium conſenſu conſtans.* Inſt. 3. 26. pr.

[b] 1 Term Rep. 454.

for

for goods ſold and delivered, brought by four partners, plaintiffs, three of whom lived in *England*, and the other in *Guernſey*. The defendant, who lived in *Cornwall*, ſent an order for ſome brandy to the partner living in *Guernſey*, which he directed to be delivered to one *Wood*, the captain of a ſmuggling veſſel. Some of it was delivered at *Guernſey*, other part of it at ſea. It was all put, by the partner at *Guernſey*, into half ankers, and ready ſlung for the purpoſe of ſmuggling: but it was to be brought into *England* at the riſk of the defendant. The contract was made, and the goods delivered, without the privity or perſonal participation of the three partners reſiding in *England*. Two objections were made at the trial by the defendant's counſel; 1ſt. That *Wood*'s handwriting, acknowledging the receipt of the goods, was not ſufficient to charge the defendant, but that *Wood* himſelf ought to have been called: but as it was eſtabliſhed that *Wood* was the defendant's agent for this purpoſe, the goods being directed to be delivered to him, Mr. Juſtice *Buller* thought that any acknowledgement under his hand was evidence againſt his principal, as much as if it had been an acknowledgement in the handwriting of the defendant himſelf. 2dly. It

was objected that the plaintiffs could not recover, because it appeared by their own shewing, that the goods were intended to be smuggled into *England*, of the laws of which, they, as subjects of the Crown of *Great Britain*, were bound to take notice, and that one of them had actually assisted in the very act of smuggling: and the learned Judge being of that opinion, nonsuited the plaintiffs.

Lawrence Sejreant, against the rule, was stopped by the Court.

Gibbs, contra, admitted that the question must be considered as if all the plaintiffs lived in *England*, but contended that they were entitled to recover the value of the goods, because the contract of sale, and the delivery of the goods, were completed at *Guernsey*, where such a contract was not illegal: and the goods being afterwards smuggled into *England* will not defeat the plaintiff's right, which accrued on the delivery of them, as they were not concerned in the subsequent act of smuggling; even though they knew at the time that the defendant intended it. The case of *Holman* v. *Johnson* [c], expressly decides this point, which was fully discussed both at

[c] Cowp. 341.

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the bar and on the bench: and that caſe has been acted upon as law ever ſince. Now that cannot be diſtinguiſhed from the preſent caſe upon any of the principles on which it was decided. In both, the contract was completed abroad, and the vendor knew that the goods were to be ſmuggled into *England*[d]. But even ſuppoſing that a contract for the ſale of goods was made in *England*, and the delivery of the goods here; there is no authority to ſhew that the vendor cannot recover the price, on account of any illegal uſe which the vendee may *afterwards* make of them: and yet innumerable inſtances muſt have occurred, wherein ſuch a defence might have been ſet up in point of fact. If the ſum which the vendor was to receive depended on the ſubſequent illegal act, or if the vendee, by his contract, were obliged to make an illegal uſe of the goods, that might make a difference. But here the contract was completed before any illegal uſe was made of the goods. On the contrary there are analogous

[d] It ſhould ſeem from the manner in which the caſe of *Holman* v. *Johnſon* is reported, that one of the plaintiffs was a ſubject of this country, though reſident at *Dunkirk*; for one of them is ſtated to be *reſident* at, the other a *native* of *Dunkirk*: but no ſtreſs is laid on that circumſtance.

caſes in which it has been held, that the original contract is not affected by the ſubſequent uſe made of the thing contracted for, if it be optional in the party to apply it afterwards to what purpoſe he pleaſes. As if one lend money to another to game with, although gaming be illegal, yet it hath been held that ſuch money may be recovered by the lender, although it be lent at the time and place of play [e]. For the ſtatute 9 *Ann.* *c.* 14. *ſ.* 1. only annuls the *ſecurity*, and not the *contract*.

So in the caſe of *Petrie* v. *Hannay* [f], it was objected that, as the plaintiff knew of the illegality of the tranſaction, they ought not to recover; but the Court thought that did not affect the contract, with reſpect to the rights of the party who advanced the money by the direction of the defendant. In no inſtances have objections of this ſort prevailed, unleſs where the plaintiffs were themſelves parties to the illegal act, which cannot be ſaid to be the caſe here; for before the goods were attempted to be ſmuggled into *England*, the contract of ſale was entirely completed.

[e] Robinſon v. Bland, 2 Burr. 1077.
[f] 3 Term Rep. 418.

Lord

Lord *Kenyon* Ch. J.—If the deciſion of this caſe had the leaſt tendency to overturn that of *Holman* v. *Johnſon*, I ſhould certainly pauſe a little, before I gave any opinion, which might ſhake it. But I wiſh to leave the authority of that caſe unqueſtioned, becauſe I approve of it. To the caſe of *Robinſon* v. *Bland* I alſo give my aſſent. The former of thoſe caſes was a contract entered into by foreigners bound by no allegiance to this country: and the latter was a contract made in *France*, which, being warranted both by the laws of that country and this, was carried into execution here. But in this caſe it is admitted, and the plaintiff's counſel was obliged to make the admiſſion, that this muſt be conſidered as a contract made in *England*. But it has been inſiſted that no adjudged caſe is to be found, in which it has been determined that perſons, ſtanding in the ſituation of theſe plaintiffs, ſhall not recover. But ſimilar caſes have frequently occurred at *Niſi Prius*; and the reaſon why no ſolemn deciſions are to be met with on the ſubject is, becauſe the *Niſi Prius* determinations were thought too clear to be queſtioned. Where a contract is made for ſmuggled goods, a party cannot come into a Court of Juſtice to recover on it. A perſon ſuing in a Court of

Law, must disclose a fair transaction: and it must not appear, from his own shewing at least, that he has infringed the laws of his country. Now here, three of the plaintiffs lived in *England*; and it is clear that they knew either personally, or (which is the same) by their agent, the other partner living at *Guernsey*, that the contract, which they had entered into, was made in direct contravention of the laws of their country; for the goods came under more than suspicious circumstances, since they were sent in slings and half ankers, ready for smuggling: and it requires much argument to convince me that a contract thus made can be carried into execution in *England*. There is no *dictum* in favor of the plaintiff's right of action; and the whole string of cases by analogy is against it. Therefore I am of opinion that the non-suit ought to stand.

Ashhurst J.—I form my opinion on this circumstance, that three of the plaintiffs lived in *England*; and therefore though the partner, with whom the contract was made, lived abroad, this case must be considered in the same light as if all the partners lived here. It is not necessary to determine whether a person who sells goods in *England*, which are afterwards

terwards to be applied to an illegal purpoſe, can recover the price of them here. For in this caſe the goods were ſold and delivered, not in *England*, but in *Guernſey*, and packed too in ſuch a manner as to ſhew that they were intended for the purpoſe of ſmuggling. The plaintiffs were agents to the very act of ſmuggling; were *participes criminis*, and therefore cannot avail themſelves of the laws of this country in order to enforce a contract made in direct oppoſition to them.

Buller J.—This caſe muſt be conſidered as if it were a contract made between the plaintiffs and the defendant, all reſiding in this country, for the delivery of goods in *Guernſey*, for the purpoſe of ſmuggling them into *England*. And I uſe the latter expreſſion, becauſe it is clear, from the manner in which they were packed at the time when they were delivered, that they were intended to be ſmuggled: that was the act of the plaintiffs. And I cannot ſay in a court of juſtice that the plantiffs, ſo offending againſt the law of the land, ſhall be permitted to recover on ſuch a contract. None of the caſes cited apply to the preſent. That of *Holman* v. *Johnſon* went on the ground of the plaintiffs being foreigners, which materially diſtinguiſhes it from this; becauſe the ſubjects of one coun-

try reſiding there are not bound to take notice of the revenue laws of any other. That maxim hath been long ſince adopted here, and recognized by Lord *Mansfield* in *Holman* v. *Johnſon*. But this is the caſe of one the king's ſubjects making a contract directly againſt the ſtatute laws of this country. Neither has the caſe of *Petrie* v. *Hannay* any relation to the preſent: here the contract on which the action is founded is illegal; which was not ſo there. And in order to make this caſe like that, it is neceſſary to ſhew, that theſe plaintiffs were not concerned in the original tranſaction, but afterwards paid money for the uſe of the defendant, which they wiſhed to recover back; for there the money was paid to a perſon, who was not a partner in the original tranſaction; and the action was founded on the ſubſequent contract, and not on the ſtock-jobbing tranſaction.

Groſe J. of the ſame opinion.

Mr. J. *Buller* then ſaid, that another objection had been made at the trial, that the plaintiffs ought not to be non-ſuited, and that it ſhould have been left to the jury to conſider whether the plaintiffs knew the goods were to be ſmuggled; but that he had been

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of opinion that, as the counſel on both ſides had fully argued the queſtion of law on the admiſſion of facts, the plaintiffs ought not to be at liberty to go to the jury on the ſame facts, when they found his opinion againſt them in point of law; to which the Court aſſented.

Rule diſcharged.

But if two perſons *jointly* engage in a ſtock-jobbing tranſaction, and incur loſſes, and employ a broker to pay the differences, and one of them repay the broker with the privity and conſent of the other the whole ſum, he may recover a moiety from that other in an action for money paid to his uſe, notwithſtanding the 7 *Geo.* 2. *c.* 8. Thus in the caſe of *Petrie* v. *Hannay* g, which was cited in the foregoing, and is reported as follows; *viz.*

In the year 1773 the teſtator, *Sadlier*, *Petrie*, and the defendant, were engaged together in ſtock ſpeculations on their joint account to a conſiderable amount, the whole of which were illegal, except a transfer of a ſum of 10,000 *l.* Having incurred ſeveral loſſes, on the 8th of *January* 1774 they came to a ſettlement with *Portis* their broker, who had paid all the differences. And on that occaſion

g 3 Term Rep. 418.

ſion *Keeble* repaid to *Portis* the whole ſum which had been ſo advanced by him, except 811 *l.* which was part of the defendant's ſhare of the loſſes, and for which *Keeble* drew a bill on him in favour of *Portis*, which the defendant accepted. This bill not being paid by the defendant when it became due, *Portis* brought an action thereon, after *Keeble*'s death, againſt the preſent plaintiffs his executors, and recovered the amount, no defence being ſet up on account of the illegality of the tranſaction. £. 264 part of the ſum for which the defendant had given his acceptance, was his ſhare of the loſs ariſing from the real transfer of the 10,000*l.* The preſent action was brought to reimburſe the plaintiffs the ſum recovered againſt them by *Portis*, and the declaration was for money paid by the plaintiffs to the defendant's uſe; upon which they obtained a verdict for the whole demand, at the Sittings after laſt *Eaſter* Term, at *Guildhall*, before Lord *Kenyon*. A rule was obtained laſt term to ſhew cauſe why the verdict ſhould not be ſet aſide in *toto*, or at leaſt be reduced to the ſum of 264 *l.*

Bearcroft, *Mingay*, and *Ruſſell*, now ſhewed cauſe; contending that this caſe did not fall within the ſtatute 7 *Geo.* II. *c.* 8. for preventing

ing ſtock-jobbing, as this was not an action to recover any money "for the compounding, ſatisfying, or making up, any difference for the not delivering, transferring, having, or receiving any ſtock, &c. or for the not performing any contract or agreement ſo ſtipulated to be performed, &c." but it was to recover money which had been paid to *Portis* under the authority of the defendant, and for which he was anſwerable, whatever might have been the queſtion as between *Portis* and him.

And they relied upon the caſe of *Faikney* v. *Reynous*, and another [h], where to an action of debt on a bond the defendant pleaded the act of the 7 *Geo.* II. *c.* 8. that the plaintiff and *Richardſon* were jointly concerned in certain contracts contrary to that ſtatute; that the plaintiff voluntarily paid the differences; and that the bond was given by the defendants for ſecuring to the plaintiff *Richardſon*'s proportion of that loſs; and on demurrer the Court were clearly of opinion that the plaintiff was entitled to recover the amount which he had paid under the ſpecial authority of *Richardſon*, though for an illegal purpoſe. The principle of that caſe fully extends to

[h] 4 Burr. 2069.

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the preſent; and indeed the plaintiffs are one remove farther from the illegal tranſaction, for not only the plaintiffs were authoriſed by the defendant to pay this money to *Portis*, but *Portis* himſelf had been authoriſed before by the defendant to pay it to thoſe perſons between whom and the defendant the illegal contract was entered into. At all events, the plaintiffs are entitled to the 264*l.* even if they are precluded from recovering the reſt; as that part of the demand ſtands perfectly clear from any objection ariſing under the act.

Erſkine and *Wood*, in ſupport of the rule, inſiſted that the whole tranſaction was illegal, and came within the ſpirit of the 7 *Geo.* 2. and that even the 264*l.* making a part of the illegal tranſaction, was ſo involved therein, that it could not be diſtinguiſhed from the reſt, ſo as to form a ſeparate conſideration, but was part of the colour uſed in carrying on the general ſcheme of ſpeculation. It is to be obſerved that *Petrie*, *Keeble*, and *Hannay*, were partners in this illegal tranſaction; they were all *participes criminis*; and it has been frequently determined, that one partner cannot call upon another for his contribution to a loſs ariſing out of a matter prohibited by law;

law; for though the act of Parliament does not say in direct terms that the security shall be void; yet when the consideration of the security is inquired into, if it appear to have been given in opposition to the spirit of the act, the court is bound to declare it void. Otherwise if a party could recover in this circuitous manner, by paying the whole of the sum in the first instance, the statute would be altogether defeated. Suppose *A.* and *B.* in partnership contract for smuggled goods, and *A.* pays the whole, and *B.* gives him his note for his proportion, it was never pretended that *A.* could recover on such note from *B.* So here, if *Keeble* had brought the action on the bill of exchange against the defendant, it would have been a good plea for the latter, that he and the plaintiff had been partners in a stock-jobbing transaction, in which a loss had happened, and that the bill was given for the defendant's proportion of that loss; and whatever would have been a good plea in such an action, is an ample defence now. As to the case of *Faikney* v. *Reynous*, it is very distinguishable from the present: that came on upon demurrer; and as the court could not look at any thing out of the record, and sufficient was not stated in the plea to shew the illegality of the transaction, this question did not

not fairly ariſe. The plea in that caſe did not ſtate that there had been a previous co-partnerſhip between the plaintiff and the defendants, to ſhare in the profit and loſs of the illegal tranſaction; the defendant *Reynous* was a mere ſtranger: but this is a ſecurity given by the defendant to the very perſon with whom he had contracted in violation of the laws of his country. From the whole of that caſe it appears that the deciſion turned on the inſufficiency of the plea, rather than on the legality of the tranſaction; and ſufficient appears to ſhew that the Court would have extended the ſtatute to a caſe like the preſent, if it had been ſo ſtated on the record. It is further to be obſerved, that at the time when this bill was accepted by the defendants, no money had been paid by *Keeble* for this expreſs ſum to *Portis*; and it was no more than a mean of the defendant's paying *Portis*, in whoſe favour it was drawn, that ſum, on account of the very differences prohibited to be recovered by the act. If ſo, no ſubſequent tranſaction to which the defendant was not a party, can vary the caſe as to him. With regard to the ſum of 264 *l.* that is ſo involved in the illegal tranſaction, that it cannot be ſeparated from it: it was a mere temporary expedient,

expedient, auxiliary to the general ſtock-jobbing ſcheme.

Lord *Kenyon* Ch. J.—As to the laſt point made in the argument, relative to the 264*l.* I have no doubt whatever. It appeared to be a fair tranſaction; the ſtock was actually purchaſed, and the transfer of it was made: none of the proviſions of the act were thereby infringed; and it is too much to ſay that, becauſe it was accompanied by other tranſactions at the ſame time, which were invalid, this ſhall not be binding. But, on the principal, I have not formed ſo deciſive an opinion but that I may be open to conviction hereafter: at preſent I can only ſay that I have not heard any argument to convince me that the plaintiff's demand can be enforced. The great difficulty is to diſtinguiſh this caſe from that of *Faikney* v. *Reynous*; but that does not at preſent appear to me to conclude this queſtion. That was an action on a bond; and the whole argument at the bar, and the deciſion of the Court, proceeded on the ground that they could not take into conſideration matter which was not properly introduced by the plea. And they thought, that as nothing illegal, as between thoſe parties, was diſcloſed on the record, the payment

ment of the money could not be reſiſted. But this is not the caſe of a bond. And if we conſider this caſe *a priori* on the ground of policy, and recollect the infinite miſchiefs brought on individuals by means of ſtock-jobbing, which this act was intended to prevent, it is very much to be wiſhed that the remedies offered by the Legiſlature ſhould extend to the whole miſchief. Now I do not ſee how that can be done ſo effectually as by ſaying that no perſon, who is concerned in ſuch a tranſaction, ſhall recover any demand ariſing out of it in a Court of Law. The firſt action, which was brought againſt theſe plaintiffs, was on a bill of exchange, which had been accepted by the defendant on account of the loſſes: Now it is clear that that action did not merge the original demand, and the whole tranſaction may ſtill be brought before the Court. And if it appear to the Court that a bill of exchange is given without any conſideration, it is *nudum pactum ex quo non oritur actio*; or if for an illegal conſideration, the whole matter may be examined. But in the caſe of a bond, the conſideration cannot always be gone into; as in the inſtance of a voluntary bond. In this caſe the teſtator and the defendant were partners in an illegal tranſaction, in which *Portis* the

the broker acted as agent, knowing it to be contrary to law, ſince every man is bound to take notice of public laws. Now it is a rule that thoſe, who come into a Court of Juſtice to ſeek redreſs, muſt come with clean hands, and muſt diſcloſe a tranſaction warranted by law. And I cannot diſtinguiſh this caſe from that of ſmuggling, put at the bar, where if one of two parties advance money in a ſmuggling tranſaction, he cannot recover his proportion of it againſt his partner, becauſe the tranſaction is prohibited; and yet ſmuggling is not *malum in ſe*, as contradiſtinguiſhed from *malum prohibitum*. If this tranſaction had been diſcloſed in the former action, *Portis* could not have recovered: now ſuppoſing the bill of exchange puts the plaintiffs in his ſituation, they are not aſſiſted by it; or conſidering them on the other hand ſtanding in their own ſituation, unconnected with *Portis*, they then appear as partners in a matter prohibited by the laws of the country, and cannot therefore have recourſe to thoſe laws to enforce their contract. But at preſent I ſpeak with great diffidence; and I ſhall be glad to correct this opinion, if on re-conſideration I find I am miſtaken. I wiſh however to have it underſtood that I do not mean to diſturb the caſe of *Faikney* v. *Reynous*; there

the Court did not think themſelves warranted in ſaying that ſufficient was diſcloſed on the record to bring the caſe within the ſtatute: but here the whole tranſaction may be enquired into, which, on examination, is I think prohibited by that act.

Aſhburſt J.—Whatever my opinion might have been, if this had been *res integra*, I think that this caſe muſt be governed by that of *Faikney* v. *Reynous*. And if we were to determine that the plaintiffs are not entitled to recover in this action, we muſt overturn the authority of that caſe. The Court did not proceed in that caſe on the ground that it was an action on the bond, and that the defendants were not at liberty to go into the conſideration of it; for they permitted a diſcuſſion of the facts ſtated in the plea, and they argued from them: but they ſaid, that even admitting them to be true, ſtill it was no defence to the action; and Lord *Mansfield* and the whole Court proceeded on the ground, that as it was not *malum in ſe*, but only *malum prohibitum*; and as the plaintiff was not concerned in the uſe which the other made of the money, it was a fair and honeſt tranſaction as between thoſe parties. Now as the Court in that caſe entered

tered into the merits diſcloſed by the plea, I ſee no difference between that caſe and the preſent. And here one of the parties (the teſtator), engaged in the tranſaction, paid money to the uſe of the defendant, which was done by paying a bill, which had been drawn by the former, and accepted, though not paid, by the latter: Now that acceptance was an admiſſion on his part that the other acted with his conſent and privity. It is the ſame as if the teſtator had originally paid this money to the defendant's uſe, with his privity and at his requeſt. And if he had made ſuch a payment, it being only *malum prohibitum*, and not *malum in ſe*, and the defendant being bound in honor and conſcience to repay him, I think the plaintiffs would have been entitled to recover.

Buller J.—With reſpect to the ſum of 264*l.* that point is too clear to admit of any doubt. But in order to conſider the great queſtion in the caſe, whether the plaintiffs are entitled to recover the large ſum under the circumſtances which are diſcloſed, it is neceſſary to trace this tranſaction to its origin. For it very much depends on the light in which this queſtion muſt have been conſidered, if *Portis* had been the plaintiff. Al-

though much evidence was given at the trial of the different tranſactions between theſe parties as far back as the year 1773, I think ſufficient is ſtated to warrant the Court in drawing this inference, that the defendant conſented and requeſted *Portis* to pay the differences in the ſtocks. And here I agree, that, in the caſe of an illegal tranſaction, if one perſon pay money for another without an expreſs authority, he cannot recover it back. For there is a wide difference between the caſes of partners engaged in legal and illegal contracts; in the former, if one of the partners pay the whole of a partnerſhip debt without any expreſs promiſe from the other, the law gives him a right to recover it back in an action for money paid to the uſe of that other partner, and it proceeds on this ground, that both are liable to pay. But in the caſe of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action againſt the other by paying the whole without his conſent; in ſuch caſes it is neceſſary to have the conſent and direction of that other. The queſtion therefore here is, whether the Court cannot infer from the evidence that the money was paid with the knowledge, conſent, and authority of the defendant; and I am of opinion that the Court

are bound to draw that concluſion. It appears that the defendant was appriſed of theſe tranſactions from time to time; and when the accounts were ſettled he made no objection, but agreed to pay his proportion of the loſs, and accepted a bill drawn on him by *Keeble* in favour of *Portis*. How then would the caſe have ſtood, if *Portis* had been the plaintiff? And here I agree with my brother *Aſhburſt*, that, as *Portis* paid the money with the conſent of the defendant, he would be entitled to recover it back again, unleſs the determination of *Faikney* v. *Reynous* be not law. Some light may perhaps be thrown on that caſe, from conſidering the time when it was argued: it came before the court in *E.* 7 *G.* 3, juſt at the time when the queſtion in pleading, whether a defendant could aver any thing *debors* the condition of the bond, had undergone much diſcuſſion in *Weſtminſter-Hall*. The caſe of *Downing* v. *Chapman* had been then argued in the Court of Common Pleas; but I do not know whether it had been decided[i]: I rather think it was then under conſideration; for if it had been determined, probably ſome notice would have been taken of it in the caſe of *Faikney* v. *Reynous*. But in later times it has been conſidered, and is

[i] Vide 2 Wilſ. 347.

now fully ſettled, that matter *debors* the bond may be pleaded. And it would be highly inconvenient if it were otherwiſe; for no perſon who is engaging in an illegal tranſaction would be ſo abſurd as to ſtate the illegality of it on the bond itſelf. It is obſervable that, in arguing *Faikney* v. *Reynous*, *Wallace* relied on the point that the party could not aver any thing *debors* the bond; to ſupport which he cited a paſſage from *Noy* 72. but that book has always been conſidered as a bad authority. But Lord *Mansfield* was ſilent on the queſtion of pleading; perhaps becauſe the other caſe was then depending in the Common Pleas; and he gave his opinion on the general ground, that if one perſon apply to another to pay his debt (whether contracted on the ſcore of uſury, or for any other purpoſe, it makes no difference), he is entitled to recover it back again. And he did not ſeem to conſider that there was any diſtinction, whether the debt aroſe on a bond or other ſecurity. The three other Judges alſo concurred; and ſaid, "that it remained "a good bond on the face of it, *till* the "obligor ſhewed that it was bad." So that the concluſion drawn by them is, that the tranſaction as diſcloſed by the plea, did not make it illegal as between thoſe parties.

There-

Therefore I think that this case is governed by that of *Faikney* v. *Reynous*.

Grose J.—I agree clearly, as to the smaller sum, that the plaintiffs are entitled to recover. As to the other point, I have had some difficulty in forming my opinion. On the part of the defendant, there is neither honour or honesty in the defence; and the plaintiffs ought to recover as much as the law can give them, without interfering with one of the most politic and beneficial statutes that was ever passed. But if we see clearly that the plaintiffs are so involved in the illegal transaction, that it was intended that the statute should extend to them, they cannot recover. However it is to be considered that this action is not founded on a promise arising by implication of law out of the illegal transaction, but from an express one made subsequently, and which the defendant was under no necessity of making: And I agree in the distinction which my brother *Buller* has made between promises founded on illegal and legal contracts. And although I have entertained doubts on this question, I cannot distinguish this case from that of *Faikney* v. *Reynous*; upon which I give my judgment.

Rule discharged.

This [k] was an action of debt upon a bond. The defendants prayed oyer of the condition; and then pleaded the act of Parliament of 7 *Geo.* II. *c.* 8. ("An act to prevent the infamous practice of ſtock-jobbing;") and that the plaintiff and *Richardſon* were jointly concerned in certain contracts, &c. That the plaintiff, contrary to the ſtatute, voluntarily gave to divers perſons large ſums of money, &c. amounting to the ſum of 3000 *l.* for compounding and making up differences for the not delivering ſtock, &c. and for not performing contracts, &c. (following the words of the act of Parliament:) and that this bond was given by the defendants to the plaintiff for ſecuring the *re-payment* of 1500 *l.* (being the moiety of the ſaid ſum of 3000 *l.*) to the plaintiff, by the ſaid *Richardſon*. To this plea the plaintiff demurred; and the defendant joined in demurrer.

Mr. *Wallace*, for the plaintiff, argued that this plea was a bad one, and *no defence* againſt this bond. The defendant inſiſts, that the bond is *void*, as being entered into for ſecuring the re-payment of money paid *illegally*, and *contrary* to this act of Parliament. The queſtion ariſes upon *ſ.* 5. of that act,

[k] Faikney v. Reynous, 4 Burr. 2069.

which

which is calculated for preventing the compounding or making up *differences* for ſtocks or other public ſecurities; without ſpecially executing the contract, and actually delivering the ſtock, &c. The offence conſtituted by this act, is the compounding differences, inſtead of actual performance of the contract: and a penalty or forfeiture of 100*l.* is inflicted upon the offender. But this *bond* is not within the clauſe. It is, at moſt, a voluntary bond, given for reimburſing the plaintiff the moiety of a ſum of money which the plaintiff had paid on account of *Richardſon* and himſelf. It is for the payment of money only. No illegal conſideration appears upon the *face* of it: and nothing *debors* can be received. The matter objected by the defendant cannot be received by the court, as *invalidating the bond*; becauſe it neither appears upon the record, nor is in itſelf criminal at common law: and the ſtatute not having declared ſuch a bond void, the court will not attend to this averment, becauſe this was not an offence till this act of Parliament made it one. *Noy* 72. *Gregory* v. *Olden*. In debt upon an obligation, it was ſaid, "that it was "made upon a ſimoniacal contract; and ſo "it was for ſimony." All that was averred to be matter *debors*, and not appeared within

in

in the deed. And *for that*, the plaintiff had judgment: for, no such averment is given by the statute. Mr. *Cox*, *contra*, on behalf of the defendant, argued, that the money was paid by *Faikney* the plaintiff, contrary to law: and this bond given to secure the re-payment of half of it to him, was in its nature void.

If *Faikney*, instead of *paying* the 3000 *l.* had only *given a bond* for that sum to those he had contracted with, such bond would have been void. And this bond for securing to *Faikney* the re-payment of *Richardson*'s half of that sum, was (as Mr. *Cox* argued) tantamount to it, and equally void. And he compared this bond given to *Faikney*, for a re-payment of money illegally paid by him, to the case of a bond given by a third person for re-payment of money given to compound a felony. He observed, that by the first section of this act, *Faikney* might recover back the whole 3000 *l.* from the persons to whom he had paid it: in which event, he would even be a gainer of 1500 *l.* if he could also recover so much upon the present bond, and thereby be twice paid. If two partners in smuggling should be to pay money upon an illegal consideration; and one of them should pay the whole, and take a bond from the other for half; such

ſuch bond he ſaid, would be void. So, if the money ſecured by the bond was advanced and paid in any criminal tranſaction. And he mentioned a caſe in the Exchequer, a few years ago, where the court would not relieve, in a contract between two highwaymen: for the whole tranſaction was founded on a criminal offence. So here, *Faikney* and *Richardſon* were partners in all theſe contracts: and both partners were culpable. *Faikney* was the principal: *Richardſon*, only a partner. The plaintiff *(Faikney)* was not an innocent perſon, but principally criminal, and the actual offender. This is a mere evaſion of the act, and would render it quite nugatory. It is totally at an end, if this bond is not void: for, the money would, or at leaſt might, always be paid in this method, if this method ſhould now be allowed. As it was a matter of great conſequence, he therefore hoped for another argument; and ſaid he had not had ſufficient time to prepare an argument in ſupport of the demurrer.

Mr. *Wallace*, in reply.— The imaginary bonds which Mr. *Cox* has ſuppoſed, would not be void. However, *this* bond can, at the utmoſt, be no more than a bond without a legal conſideration to ſupport it. But if it were

were ſo, it would be no more than a voluntary bond; and would be good between the parties. This money can never be recovered *twice*. For, the firſt ſection of this act gives no ſuch recovery to the plaintiff, as Mr. *Cox* has ſurmiſed: it is confined to the particular caſes therein ſpecified, *viz.* putts, refuſals, and wagers.

Lord *Mansfield* was clear that the matter contained in this plea is no *defence* againſt the action brought upon this bond. The offence relied upon as furniſhing a ground of defence againſt being liable to pay it, is *not malum in ſe*: it is only *prohibited by this act of Parliament*. He mentioned a caſe of one *Hales*, a broker, (before himſelf at *Niſi Prius* at *Guildhall*), where a reſcounter contract, prohibited under a penalty by the ſtock-jobbing act 7 G. 2. *c.* 8. was held to be void; and that the plaintiff could not recover thereupon. But here, *one* of theſe two perſons had paid money for the other, and upon his account; and he gives him his bond to ſecure the *re-payment* of it. *This* is not prohibited. He is not concerned in the uſe which the other makes of the money: he may apply it as he thinks proper. But, certainly, this is a fair, honeſt tranſaction *between theſe two*. If money be lent

lent in order to pay a *play-debt*, (ſuppoſing the lender not to have been preſent at the time and place of the play); or in order to pay off an *uſurious* contract, or even to *lend* out money upon uſury; and a bond be given for ſecuring the re-payment of the money ſo lent; ſuch a bond will not be void: the obligor will be bound to pay it. Its being *voluntary* is *not*, of itſelf, an objection to his being liable to the payment of it: it is a good bond, unleſs ſomething appears to render it otherwiſe.

The three other Judges concurred, that this bond was *not* within the act of Parliament, nor did it appear to have been given upon any illegal conſideration; and that the plea was no defence againſt the payment of it: and therefore that it remains a *good bond* upon the *face* of it, till the obligor can *ſhew* that it is bad. They obſerved, that paying money to compound theſe differences was not a *malum in ſe*; but only ſtood prohibited by this act; which neither ſays or means to invalidate all ſecurities relating to it, (as the act againſt exceſſive gaming does): it only prohibits *paying* or *receiving* money for compounding differences. This is not a bond for payment of the *compoſition-money* to the *perſons* *Faikney*

and

and *Richardſon* had *contracted* with; but a bond for *Richardſon*'s paying to *Faikney* a *debt of honour*, and *reimburſing* to *Faikney* the money that *Faikney* had paid upon *Richardſon*'s account, to compound the difference of contracts wherein they had been jointly concerned: and therefore it is a good bond, and the plaintiff ought to recover upon it.

Per Cur. unanimouſly—Judgment for the plaintiff.

So that, where the original tranſaction however is not morally bad, its illegality ariſing only from its being prohibited by a poſitive ſtatute, every thing done in conſequence of the prohibited act, will not, of *courſe*, be conſidered as void.

With reſpect to *ſmuggling*, or the offence of importing goods without paying the duties impoſed thereon by the wiſdom of the Legiſlature, it is in its very nature a tranſaction morally bad, and productive of various miſchiefs to ſociety; for the public revenue is thereby leſſened, the fair trader injured, the nation itſelf impoveriſhed, rival and perhaps hoſtile ſtates enriched, and the perſons themſelves who are accuſtomed to this ſort of wrong,

wrong, being hardened by a courſe of diſobedience to, and defiance of the law, become at length ſo abandoned and daring, as not to heſitate at committing the greateſt outrages; and if a partner in trade ſhould be guilty of ſuch wrong, without the privity or conſent of his co-partner, it would be a violation of that faith and confidence which is ſo eſſential to partnerſhip, even though the proſpect of gain were ever ſo conſiderable without the hazard of a diſcovery; and if all the partners ſhould knowingly engage in ſuch illicit trade, they muſt be guilty of a breach of that law of nations by which the partnerſhip contract was invented for the advancement and protection of fair and open trade. And whether ſuch illicit trade be engaged in by an individual partner on the joint concern, or whether the whole firm happen to be preſent during the tranſaction, makes but little difference, for it has been decided often that in ſmuggling tranſactions all concerned muſt be conſidered as *participes criminis*, and partners are equally implicated in ſuch wrongs.

By the ſtatute 8° *Annæ*, the penalty is treble the value, for goods that come to the hands of any one, knowing they had not paid the duties. And it ſeems to be eſtabliſhed under this

this act [l], that if one of ſeveral partners is concerned in ſmuggling on account of the copartnerſhip trade, the Crown may come againſt any one of the partners for the whole penalty, it being in the nature of a *tort*, and not of a contract [m]; juſt as in caſes of *tort* a ſubject might come upon any one concerned in the *tort*. So it is where ſeveral perſons are concerned in an act of this nature, though not al together when the act is done, yet every one may be proſecuted for the penalty ſeparately; though at the ſame time the King can have but one ſatisfaction.

Thus we find judgment was given by the whole Court in the caſe of the King againſt *Richard Manning* [n]. This was an information by the Attorney General againſt the defendant, for that merchants unknown having imported 100 weight of tea, value 50*l*. and landed them in the port of *London*, the duties not paid or ſecured, the ſaid tea came to the hands and poſſeſſion of the defendant, knowing the duties not to be paid or ſecured; whereby he forfeited 150*l*. the treble value. The defendant pleads *non devenerunt*; and on

[l] Stat. 8 Ann.

[m] Bunb. 298.

[n] Comyn's Rep. 616.

a trial

a trial before Chief Baron *Reynolds*, a ſpecial verdict was found, That the 100 weight of tea was imported and landed, the duties not paid; that *Thomas Quoif* and the defendant, who knew that the duties were not paid or ſecured, bought the tea for 20 *l.* on their joint account, of one *Samuel Gibron*, of *Aſhburnham* in *Suſſex*, privately, but only a third of the money was paid by the defendant; that they afterwards carried it to *Cudham* in *Kent*, and there divided it into twelve parcels, and brought it on horſes in ſacks to a place near *London*, and thence carried it into *London*, by night, under their coats, to an inn in *Whitechapel*, where, by the defendant's direction, it was put under a bed, on which the defendant laid himſelf down, whilſt *Thomas Quoif* went out to ſee for a purchaſer, to whom they ſold it for 24 *l.* and the defendant had 8 *l.* the third part of that price, for his proportion of the tea.

That the value of the tea was 24 *l.* the treble value 72 *l.*; and whether the whole 100 lb. of tea came to the defendant's poſſeſſion they ſubmit to the judgment of the Court; and if the Court be of opinion that the 100 lb. of tea did come to the poſſeſſion of the defendant, they find it; but if the

Court think that only a third part of it came to his hands, they find that a third only came to his poſſeſſion.

By the ſtatute 8 *Annæ*, *c.* 7. *ſ.* 17. if any goods whatever liable to the payment of duties ſhall be unſhipped with intent to be laid on land, (the cuſtoms and other duties not being firſt paid or ſecured) or if any prohibited goods ſhall be imported, not only the goods ſhall be forfeit, but alſo the perſons aſſiſting or otherwiſe concerned in the unſhipping thereof, or to whoſe hands the ſame ſhall knowingly come after the unſhipping, ſhall forfeit treble the value thereof.

And it was inſiſted by Mr. *Strange*, Solicitor General, that the treble value of the whole 100 weight of tea was forfeit; for the defendant and *Quoif* having bought the tea on their joint accounts, the defendant had the poſſeſſion of the whole, and partners in a wrong are anſwerable for the whole; and cited a caſe *Mic.* 1721. *Doe* v. *Butlar*, on a *devenerunt*, where it was ſaid, That the defendant having carried away for his ſhare but four anchors of the 320 gallons of brandy and 200 gallons of wine, charged in the information, ought to be charged with no more than what

what he carried away; but by *Montague* Chief Baron, as the defendant was preſent when the whole quantity came on ſhore, he was liable for all, it not being material what he carried off himſelf; and a verdict was for the King for the whole.

So in *Michaelmas* 1726. The *Attorney General* v. *Ambro. Burgeſs*[o], on a *devenerunt* for 3000 lb. of tea, and 200 lb. of coffee, it appeared that the defendant had ſeveral partners in the goods, and that all did not come to the defendant's own hands; but *Pengelly*, Chief Baron—As there appeared no diſtribution to be made between the partners, and they having a joint property, the poſſeſſion of the perſons to whoſe hands the goods came was the poſſeſſion of the defendant; and when ſeveral perſons are concerned in a fact of this nature, though they are not all together when the fact is committed, every one may be proſecuted for the penalty ſeparately; that the receiving of the goods by the defendant's agents after the landing, was ſufficient to charge the defendant; and as all the partners acted their parts, they were agents for one another, and all chargeable. That where ſeveral were concerned in taking goods,

[o] Bunb. 223.

trover lay againſt any one; and the King had a verdict for the whole quantity.

So in the caſes, The *Attorney General* v. *John Palmer*, in *Paſch.* 1727.

The *Attorney General* v. *Edward Carbeld*, *Hil.* 1732.

The *Attorney General* v. *Sweeting*, in *Paſch.* 1727.

The Court took time to conſider thoſe caſes, and after ſome days conſideration, I was of opinion for the King, but not merely becauſe the goods were bought on their joint account, for though joint-tenants *ſont ſeiſes per my et per tout*, yet to divers purpoſes each hath but a right to a moiety, as to infeoff, give or demiſe, to forfeit or loſe by default. *Co. Lit.* 180. a. If two purchaſe, and one is a villain, the lord can enter but into a moiety, or if one be an alien, the King, on office found, ſhall have but a moiety. If one joint-tenant be indebted to the King, but a moiety ſhall be extended; and if he die before any extent, no

P Bunb. 223. (In N.)

extent

extent ſhall be made on the land in the hands of the ſurvivor. *Co. Lit.* 185, *a.*

If *A. B.* and *C.* are partners, and judgment and execution is ſued againſt *A.* only his ſhare of the goods can be ſold. It is true, the ſheriff may ſeize the whole, becauſe the ſhare of each being undivided cannot be known; and if he ſeize more than a third part, he can only ſell a third of what is ſeized, for *B.* and *C.* have an equal intereſt with *A.* in the goods ſeized; but the ſheriff can only ſell the part of him againſt whom the judgment and execution was ſued. So it was reſolved by *Holt* and the Court, *Heydon* and *Heydon*, *Mich.* 5 *W.* & *M* [q]. So it was holden *per Holt* [r], and no Judge denied it; and *Pollexfen*'s opinion accords. And in that caſe *Backhurſt* and *Clinkard*, 1 *Show.* 174. when a *ſcire facias* iſſued againſt *B.* after the ſeizure of all the partnerſhip goods upon the judgment and execution againſt *A.* and the ſheriff returned *nulla bona*, it was holden a falſe return; for *B.* had a ſhare of the goods, and the poſſeſſion

[q] 1 Salk. 392. Holt 302. S. C. 1 Show. 174. Comyns 277. 626.

[r] Holt 643. S. C. 2 Ld. Raym. 871. 1 Show. 174.

continued in him, notwithſtanding the ſeizure upon the execution againſt *A.*

But for the more explicit declarations of the grounds of my opinion, I do agree, firſt, That where ſeveral perſons are engaged in a tortious act, all preſent and aiding and aſſiſting in it are equally culpable, and liable to anſwer for the whole of the miſchief done; and that where they are parties in the act, though not perhaps preſent at that particular branch of it for which he is charged. It is ſo in caſe of a robbery, burglary or other felony [s]; and therefore if *A.* and *B.* engage in a robbery or burglary, and *A.* ſtands to watch while *B.* breaks open and robs the houſe, or while *B.* purſues and robs a perſon out of his ſight, and if *B.* kills the man, *A.* is guilty of the murder. So it is if ſeveral come to do a treſpaſs, to make an affray, rob a park, plunder a ſhip, or run prohibited or uncuſtomed goods, all engaged in the fact are chargeable with the whole doings, and all the conſequences of it, if murder be committed by any of the company, though the reſt were in other rooms, in other parts of the park, or know not what goods were taken or carried off by others, they are equally guilty; for in

[s] Foſt. 350.

the

the eye of the law they were all preſent aiding and aſſiſting; and therefore if the defendant had been found guilty of aiding or aſſiſting, or otherwiſe concerned in unſhipping the tea, I ſhould make no queſtion but that he would have been liable to the penalty of the treble value for what he or any others at that time carried off, for they were all aiding, aſſiſting, and concurring in the ſame tortious act.

And this is what was determined in the caſes cited. In the caſe of *Doe* and *Butlar*, the Chief Baron *Montague* ſaith, The defendant was preſent when the whole came on ſhore, therefore it was not material what he carried off.

So was the determination by Chief Baron *Pengelly*, in the caſe of the *Attorney General* and *Burgeſs*. All the partners acted their parts, and were agents one for another, and all chargeable.

It is ſaid indeed before, the partners having a joint property, the poſſeſſion of the perſons to whoſe hands the goods came was the poſſeſſion of the defendant; but this cannot be meant of a joint property by purchaſe, but

where ſeveral perſons are parties in the *tort*. In running the goods into other hands, the poſſeſſion of thoſe into whoſe hands the goods came is the poſſeſſion of the defendant, who was a party in the running of them, though he was not the particular perſon who brought the goods to the hand in which they were found; for ſo it is, added he, where ſeveral perſons were concerned in a fact of this nature, though not all together when the fact is committed, yet every one may be proſecuted for the penalty ſeparately [t]. This, or ſimilar to this, muſt be the caſe to make all the expreſſions pertinent and conſiſtent, if we have a full and right account of them.

So in the caſe of the *Attorney General* v. *Palmer*, which was on a *devenerunt* for 1000lb. of coffee. It was objected, that the defendant being hired with others for carrying the goods in the information, he was chargeable for no more than the two bags which he carried.

But it was anſwered by the Chief Baron *Pengelly* very rightly, that the defendant was a perſon to whoſe hands the goods came within the nature of the ſtatute; for as all the

[t] Carth. 171. Dyer 159. b. 160. a.

perſons

perſons went together with one intent, the Crown might charge whom they would. All agents are to be charged, otherwiſe the act was not made full enough for the benefit of the Crown: and it appeared that the defendant had the whole charge of the goods for ſome part of the time. A private perſon may bring an action againſt any one, where ſeveral are concerned in taking his goods from him. He remembered an action againſt two for ſtranding a ſhip, when 200 were concerned, and a verdict there, and they paid the money.

So in the caſe of the *Attorney General* v. *Edward Carbeld*, on a *devenerunt*, for 6000 lb. of tea, which it was proved the defendant and others brought from the ſea ſide at ſeveral times. It was objected, that the defendant could not be charged with more than the three horſe-loads he carried, ſince the defendant had not the command of the reſt, nor was their maſter. But it was anſwered, Where ſeveral are concerned in a joint deſign, they are all anſwerable, as in caſes of coſts and wrongs. In treſpaſs, if ſeveral take away goods, all are anſwerable for the whole. The laſt caſe, the *Attorney General* and *Palmer* [u],

[u] Bunb. 223. n.

was

was cited, that the ſeveral proſecutions there could be but one recovery by the King; for if ſatisfaction was recovered from one for the whole, the others were diſcharged: if ſeveral are bound in a bond, all may be ſued, but there can be but one ſatisfaction.

Per Chief Baron *Reynolds*. Where ſeveral are jointly concerned, it is a joint undertaking; they are liable for the whole, though the Crown can have but one ſatisfaction: and the King had a verdict for the whole.

A caſe was cited, P. 1727, *inter* The *Attorney General* and *Sweeting*, on a *devenerunt* for 1800 lb. of tea, 100 lb. of cocoa, 150 lb. of coffee.

Objection. The defendant was not chargeable within the words of the ſtatute; for he kept a public-houſe, and was not reſponſible for the goods brought there by the gueſts; the goods belonged to another, and the defendant could not know but by hearſay that the goods were run.

But Chief Baron *Pengelly* was of opinion, that ſince the act made, not only the importer, but thoſe to whoſe hands the goods came after,

after, were liable to proſecution. The Crown might charge all to whoſe hands the goods came after importation; for the firſt might not be found, and if other perſons could not be proſecuted, the act would be evaded; and where a perſon delivers run goods over to another, both are equally guilty.

And afterwards, *viz.* in *February* 1738, *Hil.* 12 *Geo.* 2. the Court gave their opinion. And it was agreed, firſt, That in all caſes of *tort*, all perſons preſent, aiding and aſſiſting, are equally liable for the whole miſchief done; and one ſhall not excuſe himſelf by ſaying that he did but little part of the treſpaſs; for in treſpaſs there are no acceſſaries, but all aiding and aſſiſting in it are liable.

So that in pulling down a houſe, plundering a ſhip, running goods, which are illicit and tortious acts, all are reſponſible for the whole damage done. And this is what was determined by Chief Baron *Montague*, *Doe* v. *Butler*, the defendant being preſent, and helping to bring the whole on ſhore, was reſponſible for the whole, and it is not material what he himſelf carried.

So by Chief Baron *Pengelly*, in the caſes of The *Attorney General* v. *Burgeſs*, and The *Attorney*

torney General and *Calver*, That where ſeveral perſons are concerned in a joint fact of this nature, though not all together when the fact is done, every one may be proſecuted for the penalty ſeparately.

So Chief Baron *Reynolds* determined in the caſe of The *Attorney General* and *Carbeld*, where ſeveral are jointly concerned, and it is a joint undertaking, they are all liable for the whole.

Secondly, It is agreed, that where run goods come to the hands of any perſon knowingly, by this ſtatute 8 *Ann.* ſuch perſon is made liable to the ſame penalty of the treble value, although he is but in the nature of an acceſſary in receiving the goods, as well as the principal, who was aſſiſting in the running and unſhipping of the goods. But there is this difference between them; he who was preſent in helping the goods on ſhore, is a party in the illicit act itſelf, and therefore is chargeable with the whole; but he who receives any part of the goods after they are put on ſhore, is not a party to the original act, but is only culpable for what he receives, and conſequently can forfeit only the treble value of the goods which came to his hands.

And

And I believe nobody would think it ſo conſonant to juſtice, that the receiver of a pound of tea or coffee, which had not paid duties, ſhould pay the treble value of 1000lh. which was run at the ſame time, which he knew nothing of. Our law is very cautious in extending puniſhment beyond its due proportion; and therefore in treſpaſs, *maybem*, *præmunire*, *&c.* there are no acceſſaries; for acceſſaries before, by counſel or command, are in the ſame degree as principals; but the acceſſaries after, by receiving the offender, cannot by law be under any penalty, unleſs the ſtatutes which induce the penalty expreſsly extend to receivers and comforters, as ſome do[x]. 1 *Hale*'s Hiſt. P. C. 613.

Thirdly, It is agreed, That if a perſon be hired to carry goods which have not paid duties, knowing the duties unpaid, he is a perſon to whoſe hands the goods knowingly come, and conſequently liable to the penalty of the treble value, otherwiſe the act might be eaſily eluded.

But there is a difference where a perſon is hired to help to convey the goods on ſhore, from him, who being preſent, and aiding and

[x] 4 Bl. Com. 36.

aſſiſting

aſſiſting in the unſhipping of the goods, is party in the wrong, and liable as every principal actor to anſwer the whole damage.

And that was the caſe of the *Attorney General* and *Palmer*, wherein it was ſaid, that all the perſons hired went together with one intent to carry off the goods. If perſons are hired to pull down a houſe, they are all treſpaſſers. But if a porter be hired to carry a parcel of tea after the importation, which he knows was run, he is a perſon to whoſe hands that parcel came within the intent of the act, and will be liable to the treble value of that parcel: but I believe nobody will ſay that he is anſwerable for the treble value of the whole cargo.

Fourthly, So likewiſe if a keeper of a public-houſe receives the whole parcel, which any one of his gueſts, whom he knows to be a ſmuggler, brings to him, and takes it into his poſſeſſion, and conceals it for him, he is a perſon to whoſe hands thoſe goods came, and will be chargeable with the penalty of the treble value of what he ſo concealed, but not of the goods carried by other perſons to other places.

So

So was the caſe of The *Attorney General* and *Sweeting*, and many ſubſequent determinations.

Fifthly, So likewiſe if a perſon buy any quantity of goods which he knows were run, and the cuſtoms not paid, he will be chargeable with the treble value of the goods ſo bought, for he is a perſon to whoſe hands the goods came; for though it was under the pretence of a contract, yet ſince he knew that the cuſtoms were unpaid, it was an illicit contract, and he becomes *particeps criminis* by receiving theſe goods; and the contract or purchaſe will no more exempt him than if he had bought goods of a pirate or felon, which alters not the property of them.

By the ſtat. 8 *Geo.* 3. *c.* 18. *ſ.* 10. Foraſmuch as perſons uſing clandeſtine trade, are greatly encouraged by many for private lucre, who buy and receive goods clandeſtinely imported; if any ſhall buy or receive any goods clandeſtinely run or imported before condemned, knowing the ſame ſo to be clandeſtinely run or imported, forfeits 20*l.* on conviction before a juſtice of the peace.

But ſuppoſe two perſons join ſtock together, and buy goods on their joint account, and one is conuſant that the goods are run, and the other is not, (which was the preſent caſe, for it cannot be intended that *Quoif* knew the goods were uncuſtomed, unleſs it had been ſo found, for *fraus non eſt præſumenda*), I am clearly of opinion that the defendant is liable to the treble value, though *Quoif* is not; but then the queſtion will be for what quantity he is liable; and I am of opinion, that if they had divided the goods after their purchaſe, that the defendant could be liable only to the treble value of his ſhare, and no more, for no more came to his hand or poſſeſſion; for though joint-tenants are ſeiſed or poſſeſſed *per my et per tout*, that is, they are ſo far poſſeſſed of the whole that none can ſay, till partition made, that this or that part is not in his poſſeſſion [y], yet they in right and reality are poſſeſſed of no more than the proper ſhare or purparty.

As therefore they give or diſpoſe of no more, ſo neither can they forfeit any more [z].

[y] *Vide ſupra* p. 260.

[z] Co. Lit. 186. a.

If

If a villain and freeman purchaſe, the lord is entitled to what his villain is poſſeſſed of, yet he can enter into a moiety only [a].

So if an alien and natural-born ſubject purchaſe, though the heir is entitled to all the alien was ſeiſed or poſſeſſed of, yet the heir, on office found, can have but a moiety.

The treble value of what comes to the defendant's hands is the meaſure of his penalty, but that muſt be meant of what really and truly comes into his poſſeſſion, and not what notionally and virtually only can be ſaid to be in his poſſeſſion.

If partners be of goods, and execution be ſued by *fieri facias* againſt one for his ſeparate debt, the ſheriff may ſeize the whole in order to inventory and appraiſe them, and to have a true account of the value; but he can ſell but the ſhare of him againſt whom the *fieri facias* was ſued [b], for the *fieri facias* warrants him to levy *de bonis et catallis* of the one, and all may in ſome ſenſe be ſaid to be his goods, becauſe he hath a joint intereſt in all, yet ſince he hath a right and poſſeſſion of

[a] *Supra* p. 260.
[b] *Supra* p. 261.

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[a] *Supra* p. 260.
[b] *Supra* p. 261.

a moiety only, the ſheriff can diſpoſe of n
more [c].

And notwithſtanding ſuch ſeizure of th
whole, the other partner continues in po
ſeſſion of his ſhare or moiety [d]; and therefo
where *A.* *B.* and *C.* were partners, and upo
a *fieri facias* againſt *A.* the ſheriff had ſeize
the whole, and a *fieri facias* came againſt *
and the ſheriff returned *nulla bona*, it was r
ſolved that an action on the caſe lay again
him for the falſe return, for *B.* was ſtill
poſſeſſion of his third part of the goods.

However, as this ſpecial verdict is foun
I think the whole cwt. of tea came to the d
fendant's poſſeſſion, for it is ſaid, that
took care of the whole, that by his directi
it was put under the bed, and he lay do
on the bed; ſo that apparently he had at o
time the whole under his cuſtody and ca
and uſed endeavours to conceal it, knowi
the whole to be uncuſtomed goods. Wh
more does an inn-keeper or alehouſe-keep
do, who takes the goods of a ſmuggler to
up and conceal?

[c] 1 Salk. 392.

[d] 1 Show. 74.

So it was determined in the caſe of The *Attorney General* and *Sweeting*, 1727, and many times ſince.

A joint-tenant may make his companion his bailiff, and maintain account againſt him as ſuch. *Co. Lit.* 186. *a.* Here *Thomas Quoif* intruſts the defendant with the goods to conceal and ſecure them; ſuppoſe he had embezzled them, would he not have been chargeable by his companion for them? And if ſo, he muſt have poſſeſſion of them.

It is not neceſſary that he to whoſe hands goods came ſhould have the abſolute poſſeſſion in them. If a man delivers money to a ſervant to carry, and he is robbed of it, the ſervant may maintain an action againſt the hundred, and declare that he was poſſeſſed *ut de bonis ſuis propriis.*

So it was reſolved 4 *Mod.* 303. And yet the poſſeſſion is not deveſted out of the maſter, for he may bring an action if he pleaſes[e].

And although ſmuggling be an offence againſt the laws, yet ſtill may partners in

[e] Comb. 263. Holt 37. 12 Mod. 54. S. C.

trade ſubject themſelves not only to the penalty incurred, but alſo make themſelves liable to the bankrupt laws thereby, for *per* Lord *Hardwicke* "A perſon who has dealt "merely in ſmuggling and running of goods, "though this is an offence, and contrary to an "act of Parliament, yet ſtill it will be a trading "within the meaning of the bankrupt acts, "and ſuch trader is liable to a commiſſion [f]."

[f] 1 Atk. 199. Cooke's B. L. 67.

CHAPTER X.

How far Partners are bound in reſpect of Contracts affected by Uſury.

IT has already been pointed out that in order to make a man liable as a partner there muſt either be a contract between him and the oſtenſible perſon to ſhare jointly in the profits and loſs, or he muſt have permitted the other to make uſe of his credit, and to hold him out as one jointly anſwerable with himſelf [a].

But if a contract be entered into between parties, which is in itſelf immoral, or a violation of the general laws of public policy ſuch as being affected by uſury, that does not amount to a partnerſhip contract within the legal principles eſtabliſhed reſpecting joint traders, and the parties themſelves are not legally bound by ſuch an unconſcionable bargain. For example;

If an agreement purporting to be, or aſſuming the ſhape of, a partnerſhip in trade,

[a] Cowp. 793.

be contracted for a ſingle dealing, and one of the partners ſhall advance a ſum of money for the purchaſe of particular goods, ſtipulating at the ſame time to have *half the profits* upon a re-ſale of ſuch goods, which profits *exceed 5 l. per cent.* and *the principal not riſked*, the bargain being *unconſcionable*, is ſaid not to be binding.

Thus in the caſe of *Jeſtons* v. *Brooke* [b]; where *A.* in conſideration of advancing 45 *l.* for which he took the borrower's note of hand, payable on demand, ſtipulated to have half of the profits upon a re-ſale of certain goods intended to be purchaſed by the borrower with the money; *two hours* after the purchaſe, *A.* demanded payment of the note; and the ſame night put a perſon into poſſeſſion jointly for himſelf and the borrower. The neat profits upon a re-ſale were 5 *l.*

The bargain was held to be *unconſcionable*; and therefore *A.* was not allowed to recover his ſhare of the profits in *an action for money had and received.*

This was an action for "*money had and received:*" And upon a rule to ſhew cauſe why

[b] Cowp. 793.

the verdict obtained for the plaintiff ſhould not be ſet aſide, and a nonſuit entered in its ſtead,

Lord *Manſfield* reported as follows:— "The plaintiff and defendant were both brokers: the defendant wanted to purchaſe a parcel of goods, which had been diſtrained for rent, but had no money. He applied therefore to the plaintiff, who on the 12th of *November* 1777, lent him 45 *l.* upon his note of hand, payable on demand. At the ſame time it was agreed, that the plaintiff ſhould have half of the neat profits, which ſhould be made of the goods upon the re-ſale of them, over and above the note of hand. Two hours after the ſale, payment of the note of hand was demanded by the plaintiff, in order to force the defendant to ſell the whole of the goods to him; and as an inducement, the plaintiff offered him 3 *l.* profit, which the defendant refuſed, and ſold the goods after for 5 *l.* profit. The plaintiff paid the 45 *l.* to the landlord, by the direction of the defendant, and put a man into poſſeſſion on the night of the ſale. The note was re-paid on the 21ſt of the ſame month. This action was brought for 2 *l.* 10 *s.* the half of the neat profits for which the goods were re-ſold. To-

wards the end of the cauſe, it ſtruck me that this contract was uſurious on the part of the plaintiff, becauſe he was to have half of the profits, and was to run no riſk. The jury found a verdict for the plaintiff, ſubject to the opinion of the court, upon the queſtion, whether this contract was uſurious or not? If the court ſhould be of opinion that it was, then the verdict was to be ſet aſide, and a nonſuit entered in its ſtead."

Mr. *Wallace*, in ſupport of the verdict, argued, this was not an uſurious contract, 1ſt, Becauſe there was no certainty upon the original agreement of any intereſt beyond 5 *per cent.* but the whole reſted in contingency, upon what would be the neat profits ariſing from the re-ſale of the goods; and if there had been no profit at all, the plaintiff would have had no intereſt whatever. It is true, a mere colourable contingency will not aid a contract, where by the very terms of the agreement uſurious intereſt is reſerved: but in the preſent caſe, it could not be known what the profits of the ſale would be: it depended upon the defendant's meeting with a good purchaſer, and upon the money being collected in. It might happen that the goods ſhould ſell at a loſs. The contingency therefore was

real,

real, not colourable only; conſequently not within the ſtatute. 2d, To make a contract uſurious, illegal intereſt muſt be reſerved by the very terms of the contract: whereas, in this caſe, the note of hand given by the defendant bore no intereſt at all. Therefore he prayed the rule might be diſcharged.

Mr. *Howarth*, *contra*, in ſupport of the rule inſiſted that the tranſaction was clearly uſurious. All that is eſſential to make a contract uſurious, is, that it ſhould be for a loan, with a reſervation of more than 5 *per cent.* intereſt, for forbearance of the principal. Here, the principal was ſecured by a note of hand, payable on demand; conſequently the plaintiff run no riſk. In addition to this, the plaintiff at the ſame time ſtipulates for half of the neat profits upon a re-ſale of the goods; which it appears, far exceeded the rate of legal intereſt. It is material too in this caſe, that the plaintiff who had viewed the goods, muſt, from his occupation, neceſſarily have known what they were fairly worth. If the contract is a loan, and the intention is to get more than legal intereſt, no ſhift or contrivance can take it out of the ſtatute. A contract is not leſs uſurious, becauſe no intereſt is reſerved upon the ſum advanced: If ſomething alſo, as a horſe,

horſe, &c. the value of which exceeds the legal rate of intereſt, is ſubſtituted in its ſtead. Therefore he prayed a nonſuit might be entered.

Lord *Mansfield*.—This is an action for money had and received; and therefore it is analogous to a bill in equity. The ground of the action is, to recover half of the neat profits ariſing by the re-ſale of certain goods purchaſed by the defendant, as ſtated in the report. The general queſtion is, "Whether the plaintiff ought to recover in an action for money had and received?" That is, "Whether it is againſt conſcience the defendant ſhould retain the whole profits of the goods in queſtion to himſelf?" There are two grounds, either of which is an anſwer to the action: 1ſt, If the contract be uſurious within the ſtatute: or, 2d, Though not uſury within the ſtatute, if it be an unconſcionable bargain. You all remember where the court held a caſe not within the ſtatute of uſury; I mean the caſe of the wire-drawers [c]. The ground of the action there was, that the plaintiffs, who were gold refiners, had advanced gold-wire to others in the ſame trade, upon the terms of paying ſuch a price, if the mo-

[c] Cowp. 112.

ney

ney was paid within three months; and if not, then to pay at the rate of an halfpenny an ounce per month, over and above the price agreed for: which in fact, upon calculation, amounted to above 5 *per cent.* This, at the trial, was proved to be the conſtant uſage of the trade. An objection was made on the part of the defendant, that it was uſurious. A verdict was found for the plaintiff, and a queſtion reſerved for the opinion of the Court, Whether this contract was uſury? And under all the circumſtances, eſpecially the conſtant uſage, the Court were of opinion it did not amount to uſury within the ſtatute. Some time after, an action was brought for money had and received, upon a ſimilar contract, "to recover the ſurplus of the halfpenny an ounce[d]." The defendant paid into court the principal and intereſt at 5 *per cent.* from the time of the bargain, and offered to pay coſts down to the action brought: And the ſingle queſtion was, "Whether the exceſs of intereſt ſhould be paid?" It appeared manifeſtly at the trial, that this exceſs was only to be taken in caſe of delay of payment at the end of three months, and for no other reaſon whatſoever; and the vendee was at liberty to have paid the principal at the expi-

[d] Cowp. 116.

ration

ration of that time. I ruled at *Guildhall*, that the tranſaction ought to be conſidered as not uſury within the ſtatute. But the law of the land having declared that 5 *per cent.* was ſufficient for delay of payment, I was of opinion that the demand of the ſurplus was an exorbitant demand, and therefore ought not to be recovered in an action for money had and received. The jury accordingly found a verdict for the defendant, and that opinion was acquieſced in without any new trial being moved for.

But to conſider this caſe firſt, in the light of an uſurious contract. There is no contrivance whatever, by which a man can cover uſury. Here are two brokers. One, who is the defendant, wants to buy goods that were upon ſale; and the other agrees to lend him money for that purpoſe; but he is to lend it upon the terms of being paid both principal and intereſt from the time the loan commenced. It is true, no rate of intereſt is reſerved in the note; but it is made payable on demand. From the moment of the demand therefore, it would carry intereſt; and the plaintiff had it in his power to make demand, the very inſtant the bill was delivered. Beſides this, he does not even truſt the defendant with the

poſſeſ-

poſſeſſion of the money in his own hands; but when the goods are bought, and not *before*, he pays the money to the landlord for the defendant. Within two hours after, he demands the money, and then the note begins to carry intereſt. He was not bound by the agreement to give credit for a moment. So that there was no ſort of riſk whatſoever; and in fact, as ſoon as the money was paid, a man was put into poſſeſſion for himſelf, as well as for the defendant. The note therefore, was payable with intereſt from the time of demanding payment, and he has poſſeſſion of the goods. That was manifeſtly with a view to ſecure to himſelf the ſurplus advantage which he had ſtipulated for, upon a reſale. Both parties from their ſituation knew there would neceſſarily be a profit. It ſeems to me therefore, that the intention of the contract was to get more than principal and legal intereſt upon the note, which is uſury within the meaning of the ſtatute. But ſuppoſe it were not ſtrictly uſurious, ſhall a man in an action for *money had and received*, which is an equitable action, and founded in conſcience, recover ſuch an unmeaſurable and exorbitant demand as this is? Moſt clearly he ſhall not. Therefore upon either ground the

the verdict muſt be ſet aſide, and the nonſuit entered.

Willes Juſtice.—I am of the ſame opinion.

Aſhhurſt Juſtice.—I think that upon the original contract, it muſt be underſtood, the plaintiff was to have no intereſt, and therefore the contract itſelf was not uſurious. But having broken the faith of that agreement, by making an immediate demand of payment, and thereby entitling himſelf to intereſt, I am of opinion he has precluded himſelf from demanding a ſhare of the profits of the ſale likewiſe; for it is againſt conſcience that he ſhould have both.

Buller Juſtice.—Whether this be uſurious or not, it is clearly great oppreſſion. Lending money is giving credit. And here, the conſideration was, that the plaintiff ſhould have half the profits of the ſale. But inſtead of giving credit, he demands the money immediately. The conſideration therefore is at an end.

Per Cur. Let a nonſuit be entered.

So

So upon the ſame ground of reaſon, if the borrower of money give a bond for the principal and intereſt at 5 *l. per cent.* and covenant at the ſame time alſo to pay to the lender a certain portion of profits of trade, this is an uſurious contract, and the obligee cannot recover on the bond; for in ſuch an agreement proviſion being made to receive the profits only, and not to engage for the loſſes of the trade, it is contrary therefore to the principle upon which the partnerſhip contract muſt be founded, namely, reciprocal advantages, and muſt conſequently be deemed a contract not binding upon the parties. Thus in the caſe of *Morſe* againſt *M. Wilſon*[e], which was an action of debt on bond for 4000 *l.* The defendant, after craving oyer of the bond, which was a joint and ſeveral bond by the defendant *Matthew* and *Harry Wilſon*; and of the condition, which was that the bond ſhould be void if the defendant, or *Harry Wilſon*, ſhould pay 2000 *l.* with lawful intereſt for the ſame at 5 *per cent.* pleaded, that before the executing of the bond *Harry Wilſon* was poſſeſſed (amongſt other things) of two ſhares, calculated to be of the value of 1000 *l.* each ſhare, in a brewhouſe ſituate, &c. and which brewhouſe and the buſineſs thereof were then occupied

[e] 4 Term Rep. 353.

cupied and carried on by him and one *William Cator* and *Francis Jefferies* in partnerſhip together, under the firm of *Cator* and Co. which two ſhares were thereafter expected to produce a large ſurplus of profits to *Harry*, over and above what would be ſufficient to ſatisfy and pay the intereſt of 2000 *l.* after the rate of 5 *l. per cent.* for the forbearance; and thereupon, on, &c. at, &c. it was corruptly, and againſt the form of the ſtatute in ſuch caſe made and provided, agreed by and between the plaintiff and *Harry Wilſon*, that the plaintiff ſhould lend to the ſaid *Harry* 2000 *l.* and ſhould forbear and give day of payment thereof to the ſaid *Harry* until and upon the ſaid 11th day of *June* 1789; and that for ſuch forbearance and giving day of payment of the ſaid 2000 *l.* the ſaid *Harry* ſhould pay to the plaintiff not only intereſt for the ſaid 2000 *l.* for and during the time of ſuch forbearance, after the rate of 5 *l. per cent.* but alſo ſuch ſurplus profits as ſhould ariſe during the time of ſuch forbearance on the ſaid two ſhares, after 5 *l. per cent. per annum* for the ſaid 2000 *l.* ſhould be paid; and that for ſecuring the re-payment of the ſaid 2000 *l.* with intereſt, at the rate of 5 *l. per cent. per annum*, the ſaid *Harry* and defendant ſhould execute the bond, &c. and that for ſecuring the payment

of

of ſuch ſurplus profits as aforeſaid, the ſaid *Harry* ſhould make and ſubſcribe a certain writing, bearing date the 11th *June* 1788, purporting that in conſideration of the ſaid 2000 *l.* received by the ſaid *Harry* from the plaintiff, he the ſaid *Harry* for himſelf, his executors, &c. made over to the ſaid plaintiff, his heirs, executors, &c. the ſaid two ſhares, &c. (that is to ſay) that after 5 *l. per cent.* was paid on the ſaid capital of 2000 *l.* ſuch ſurplus as ſhould ariſe on the ſaid two ſhares, which was calculated at 1000 *l.* each ſhare, ſhould be *bona fide* the property of the plaintiff, and ſhould be paid to the plaintiff on demand; and covenanted that on the 24th of every month of *June*, during the time the ſaid *Harry* ſhould be in poſſeſſion of the ſaid 2000 *l.* he would produce the full and true accounts of the profits, ſuch as were made up by the ſaid *Harry* and his partners, &c. The plea then ſtated that the plaintiff afterwards, (to wit) on, &c. at, &c. and in purſuance of the ſaid corrupt agreement, lent to the ſaid *Harry* the ſaid 2000 *l.* and forbore and gave day of payment thereof to the ſaid *Harry*, until and on the ſaid 11th of *June* 1789; and that after the making of the ſaid corrupt agreement, and in purſuance thereof, and for ſecuring the re-payment of the ſaid 2000 *l.*

with intereſt at the rate of 5 *l. per cent. per annum*, (to wit) on, &c. at, &c. the ſaid *Harry* and the defendant executed the bond, &c. with the ſaid condition thereunto ſubſcribed; and that in further purſuance of the ſaid corrupt agreement, and for ſecuring the payment of ſuch ſurplus profits as aforeſaid, afterwards, (to wit) on, &c. at, &c. the ſaid *Harry Wilſon* made and ſubſcribed a certain writing, bearing date the ſaid 11th of *June* 1788, according the purport and effect in that behalf aforeſaid; the defendant then averred that the ſurplus of the profits ſo agreed to be paid by the ſaid *Harry* to the plaintiff, together with the intereſt, ſo agreed to be paid by the ſaid *Harry* to the plaintiff, and ſo ſecured by the bond and the writings ſo made, &c. exceeded the rate of 5 *l. per cent. per annum*, contrary to the form of the ſtatute, &c. by means whereof the bond is null and void. To this there was a demurrer; ſtating for cauſe that it did not appear that there were any ſurplus profits ariſing during the time of the ſaid forbearance on the two ſhares in the plea mentioned; or that any thing by the ſaid agreement agreed to be paid by the ſaid *Harry* to the plaintiff, together with the ſaid intereſt, ſo agreed to be paid by the ſaid *Harry* to the ſaid plaintiff, and ſo ſecured by the bond, exceeded

ceeded the rate of 5 *l. per cent.* for the forbearance of each 100 *l. per annum*, contrary to the form of the ſtatute, &c. joinder in demurrer.

Chambre, in ſupport of the demurrer, contended that this contract was not uſurious; for although the plaintiff was intitled to the ſurplus profits of the two ſhares, in addition to the 5 *l. per cent.* on the money lent; and although as between him and the partners he was not anſwerable for the loſſes in the trade, yet to all the reſt of the world he was reſponſible for the partnerſhip debts, and thus his principal was in hazard. And it is eſſential to the crime of uſury that the principal, upon which more than legal intereſt is reſerved, ſhould not be put in hazard [f]. The diſtinction taken by *Dodderidge* J. in *Cro. Jac.* 508. has always been conſidered as the rule upon which queſtions of this ſort muſt be decided. If I lend 100 *l.* to have 120 *l.* at the year's end upon a caſualty; if the caſualty goes to the intereſt only, and not to the principal, it is uſury; for the party is ſure to have the principal again, come what will come: but if the intereſt and principal are both in hazard, it is not then uſury. If it be objected that by the terms of this contract the prin-

[f] Lord Cheſterfield v. Janſſen, 2 Wilſ. 286.

cipal is ſecured at all events; the anſwer is, that it is no farther ſecured in this caſe than in the caſe of every ſleeping partner, who receives 5 *l. per cent.* on his own ſhare of the capital, beſides his proportion of the profits. And it is immaterial whether there be or be not a clauſe in the agreement to ſubject ſuch ſleeping partner to the partnerſhip debts, becauſe the law annexes ſuch liability to the right of receiving the profits of the trade.

The queſtion relative to ſecret partners, was very fully conſidered in *Grace* v. *Smith* [s], where a partner, who retired from trade, left a ſum of money in the buſineſs, for which he was to receive a certain annuity, over and above his 5 *l. per cent.* and the Court held that he could not be conſidered as a ſecret partner, becauſe it would be unjuſt to ſubject a party to the indefinite loſſes of trade, from which he could only receive a ſtipulated profit. But here, as the plaintiff is entitled to the whole amount of the profits of the two ſhares, he muſt be reſponſible to the world for the loſſes.

In the caſe in *Blackſt.* another of *Bloxham* and *Fourdrinier* is cited, which is much ſtrong-

[s] 2 Bl. Rep. 998.

er

er than the preſent; where *Pell*, who retired from buſineſs, left a ſum of money behind, and took a bond from *Brooke* his partner to ſecure an annuity of 200 *l.* for ſix years, over and above 5 *l. per cent.* for his money, *in lieu of the profits* of the trade; and this Lord *Mansfield* held made him a partner. Now here the plaintiff was entitled to the *profits themſelves.*

Dallas, contra, was ſtopped by the Court.

Lord *Kenyon*, Ch. J. Nothing can be clearer than this caſe. The plaintiff, without having any partnerſhip in contemplation, lent 2000 *l.* to *H. Wilſon*, for which he was to receive not only 5 *l. per cent.* intereſt, but alſo ſuch ſurplus profits as ſhould ariſe from theſe two ſhares in the buſineſs, he himſelf not being bound on the other hand to make good to the partners any part of the loſſes which the trade might ſuſtain. The ſimple queſtion is, whether this is not an agreement to receive more than the 5 *l. per cent.* allowed by law for the forbearance of a loan? Moſt unqueſtionably it is; and it is therefore void. It has been argued however that this was not an uſurious contract, becauſe the principal was put in hazard, as it was liable

to the partnership creditors: but it was no farther hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency; for as between the plaintiff and the partners in the business, he was not liable to contribute to the losses in the trade.

Ashhurst, J. Where on the face of the contract itself the principal is in hazard, as in bottomry bonds, the lender may reserve more than 5 *l. per cent.* interest, without incurring the guilt of usury. But where the principal is secured at all events, and yet more than 5 *l. per cent.* may be got by the terms of the contract, it is usurious: and such is the present case.

Buller, J. In this agreement provision is made to receive the profits, but none to engage for the losses, of the trade. And therefore it is not true that the plaintiff's principal was at stake; since by the terms of the contract the trade is to be carried on by the other partners, and the plaintiff is only liable to make good the losses of the trade in the event of the insolvency of the other partners. But as between these parties, if there be any losses, they must be borne by the defendant and the other

other partners; and if there be any profit, the plaintiff is to receive his proportion of it.

Groſe, J. declared himſelf of the ſame opinion.

Judgment for the defendant.

In all partnerſhip contracts where money is furniſhed by one ſide only, if the *caſualty* goes to the *intereſt* of ſuch money only, and not to the principal it is *uſury* [h], and the lender is precluded from recovering any thing in an action at law founded upon ſuch an uſurious contract, nor can the parties be conſidered as bound by ſuch contract. But at the ſame time, to make a contract uſurious, there muſt be a *loan* of money, wares, merchandize or other commodity, to be re-paid and reſtored to the lender with higher intereſt than the ſtatute allows; it is eſſential that the thing *lent* is to be returned, for it cannot be a *loan* unleſs the money or thing borrowed is to be reſtored; the making illegal intereſt precarious, if the loan of the principal money or thing is to be reſtored, will not take it out of the ſtatute; nor [i] will any other ſhift or

[h] 1 Term Rep. 200.

[i] 3 Wilſ. 395.

contrivance whatever. In the caſe of *Roberts* v. *Trenayne*, Juſtice *Dodderidge* took theſe differences in caſes of *caſual uſury*. Firſt [k],

If money be lent on a *riſk* at more than legal intereſt, and the caſualty affects the *intereſt* only, it is uſury; for the party is ſure to have the principal again at all events; but if the intereſt and principal are both in hazard, it is not then uſury: and it was therefore adjudged in the common pleas, in *Dartmouth*'s caſe [l], where one went to *Newfoundland*, and another lent him 100*l.* for a year to victual his ſhip; and if he returned with the ſhip, he would have ſo many thouſands of fiſh; and expreſſes at what rate, which exceeded the intereſt allowed by the ſtatute; and if he did not return, that then he would loſe his principal; it was adjudged to be no uſury.

[k] Cro. Jac. 508. Cro. Eliz. 27. 643. 741. 1 Lev. 54. Hard. 518. 1 Bulſt. 36. 1 Sid. 182. 2 Ch. Ca. 130. Vern. 263. 1 Vez. 164. 2 Burr. 704. 3 Bac. Abr. 681. 692. 1 Hawk. P. C. 531. 3 Term Rep. 531.

[l] Cro. Jac. 209.

Thus

Thus in the caſe of *Martin* v. *Abdee*[m] it was agreed, that if principal and intereſt be in hazard upon a contingency, it is no uſury, though the intereſt do exceed the allowed rate of intereſt. And when there is a hazard that the plaintiff may have leſs than his principal, it is no uſury.

And it is alſo eſtabliſhed, that a loan at more than the legal rate of intereſt is not uſury, if by the re-payment of the principal, the borrower may avoid the intereſt[n].

Thus *Dodderidge* Juſtice in the caſe of *Roberts* v. *Trenayne*[o]. Secondly, "If I ſecure both intereſt and principal, if it be at the will of the party who is to pay it, it is no uſury: as if I lend to one 100 *l.* for two years, to pay for the loan thereof 30 *l.* and if he pay the principal at the year's end, he ſhall pay nothing for intereſt, this is not uſury; for the party hath his election, and may pay it at the firſt year's end, and ſo diſcharge himſelf."

m Show. 8. Comb. 125. S. C. Carth. 67. S. C. Holt 738. S. C. Salk. 390. S. C.

n 5 Co. 69. b.

o Cro. Jac. 509. 1 Atk. 342. 351. 1 Vent. 254. 1 Sid. 37. 5 Bac. Abr. 408. 1 Hawk. P. C. 532. Cowp. 113.

Upon

Upon the very ſame principle alſo it has been held, that a bond in the penalty of 200 *l.* conditioned for the performance of articles of partnerſhip, ought not to be conſidered an uſurious contract.

Thus in the caſe of *Moriſſet* v. *King* [p], which was an action of debt on bond, in the penalty of 200 *l.* conditioned for the due performance of certain articles of partnerſhip; which articles recited that *Mary Moriſſet* had lent *Daniel King* the ſum of 100 *l.* to be repaid to her at the end of four years, *without intereſt*; but in conſideration that the ſaid *Daniel King*, his executors and adminiſtrators, ſhould find and provide for *Mary Dubois* daughter of the ſaid *Mary Moriſſet*, (the obligee), meat and drink in the houſe where he dwelt or ſhould dwell, for four years, if the ſaid *Mary Dubois* ſhould ſo long live; and that ſhe ſhould, during the ſaid term, board with him, and that ſhe ſhould be co-partner with *Mary King*, wife of the ſaid *Daniel King*, in the buſineſs of a milliner; and ſhould all that time bear one moiety of the loſſes, charges, (except houſe-keeping), ſhop-rent, and materials neceſſary

[p] 2 Burr. 891.

for

for carrying on the trade, (which the ſaid *Daniel King* did agree to provide); and they ſhould be partners, and each do their utmoſt to carry on the trade; and ſhould equally divide the *profits*; and alſo that the ſaid *Daniel King* ſhould lodge the ſaid *Mary Moriſſet* ſhe paying him 10*l.* a-year. And at the end of the four years *Daniel King* was to re-pay the 100*l.* And in caſe of the death of the ſaid *Mary Dubois*, to pay the principal, together with *lawful* intereſt, for the 100*l.* to the ſaid *Mary Moriſſet*. The defendant after having demanded and had oyer of the condition of this bond, and of the articles therein recited, pleads, "That this was a corrupt agreement;" with an averment "That the board of *Mary Moriſſet* (the mother) was worth 20*l.* a-year; and the board of *Mary Dubois* (the daughter) was worth 10*l.* a-year." To this plea the plaintiff demurred.

The only queſtion was, Whether this was an *uſurious contract*, within the ſtatute of *Ann.* q which makes void all bonds, contracts, and aſſurances, where more than 5*l.* *per cent.* *per annum* is directly and indirectly taken for any loan.

q 12 Ann. ſtat. 2. c. 16.

Mr. *Aſpin-*

Mr. *Aſpinall* argued, as counſel for the plaintiff, and Mr. *Wedderburn* for the defendant.

The Court were extremely clear that this caſe could not be within the ſtatute of uſury.

Lord *Mansfield* obſerved, "It is impoſſible to ſay that *King* might not receive ſo much advantage by this partnerſhip, as to be worth the conſideration. It might be a very advantageous bargain to *King*: there might be recommendation, ſkill, labour, or other benefits ariſing to him from it. He mentioned the caſe of Mr. *Hubert*, who entered into a private ſecret partnerſhip with *Nelſon*, who drew him into a bankruptcy thereby[r].

So here the plaintiff's daughter might have been drawn into a bankruptcy, by means of this agreement; which would have been more ſevere to her, perhaps, than the penalty of this ſtatute of uſury would be.

Mr. Juſtice *Foſter* and Mr. Juſtice *Wilmot* concurred with the Chief Juſtice. They ſaid

[r] Ante p. 138.

it did not explicitly appear whether this was a prudent agreement or not; but it might be beneficial to *King* upon the whole; at leaſt it was not ſuch a contract as could be adjudged by the Court to be uſurious within the ſtatute.

Judgment for the plaintiff.

CHAPTER XI.

Partnerſhip—

Accounts, how to be ſettled between Partners.

WHEN an account is to be taken between partners, each is entitled to be allowed againſt the other every thing he has advanced or brought into the partnerſhip concern, and to charge the other partner in account, with what that other has not brought in, or has taken out more than he ought [a].

Thus in a caſe [b], where there were two partners, and one had taken out more money from the partnerſhip ſtock, than his ſhare amounted to, and therefore became a debtor for ſo much.

Lord Chancellor *Talbot* was of opinion, that the partnerſhip creditor had a right to come upon the ſeparate eſtate of the partner, who was ſo indebted.

[a] Cowp. 471.

[b] Ex parte Drake cited 1 Atk. 225. 2 Ch. Rep. 226. S. P. 16 Vin. Abr. 242. Cooke's B. L. 612.

Tho'

Tho' length of time is no bar between merchant and merchant, whilſt their accounts are going on, yet dealings having ceaſed many years between them, and, after diſputes there having been an acquieſcence till the death of one of them, the Court of Chancery will not decree an account with the ſurvivor, but leave the plaintiff to his remedy at law [c].

Where *A.* and *B.* partners in trade ſtated their account, and *A.* gave *B.* a note for the balance, but at the ſame time promiſed to rectify any error or miſtake in the account; *B.* obtained judgment againſt *A.* on the note at law; and the Court of Chancery decreed a new account concerning their ſtock and trade, and payments and receipts, and each to produce their books of account on oath, and what ſhould appear due, to be paid with intereſt when and where the Maſter ſhould appoint [d].

A bill [e] is for an account by *A.* a merchant againſt *B.* a merchant who was his partner. Defendant pleads, that the dealings concern-

[c] 2 Vern. 276.

[d] Fin. R. 431. Vin. Abr. 247.

[e] Budges and Mitchell, Gilb. Eq. Rep. 224.

ing

ing which plaintiff prays an account, were tranſacted above twenty years before the bill brought; and pleads ſuch acquieſcence without ſuit, and alſo the ſtatute of Limitations in bar of the account.

Per Cur. Forbearance of ſuit for twenty years will in equity be a good bar though between merchant and merchant.

It is not neceſſary for the defendant in ſuch a bill to aver in his anſwer, that he did not promiſe within ſix years to account, *&c.* unleſs particularly charged in the bill; as was reſolved in *Bodvil* and the Biſhop of *Meath* [f], and ſaid *per cur'* in the above caſe.

And though the ſtatute of Limitations has been always conſtrued to except accounts open between merchant and merchant, yet that is to be underſtood with this diſtinction, that if open accounts be by ſubſequent acts continued, they are not barred by the intervention of ſuch length of time from the original tranſaction [g]; but if ſuch an account is by the plaintiff deſerted, in ſuch caſe it is

[f] Gilb. Eq. Rep. 225.

[g] Cooke's B. L. 608.

barred,

barred, exactly as if it had been formally cloſed; and is taken to have been ſo.

And in a matter *ex parte Grill* [h] joint aſſignees were not permitted to prove againſt the ſeparate eſtate, the balance of a long account due from the partner to the partnerſhip.

A. a clothier and *B.* a dyer, had mutual dealings in their way of trade, which were carried on for ſeveral years without payment of money on either ſide, but the debts on one ſide were paid off againſt the debts on the other. *B.* was otherwiſe indebted to *A.* and on ſtating accounts in 300*l.* for which he made a *mortgage*, and afterwards owed *A.* 200*l.* for which he gave bond and judgment: *B.* dies inteſtate, and indebted to others by ſpecialties, who as principal creditors take out adminiſtration, and finding ſeveral ſums due from *A.* ſue him at law [i].

On a bill by *A. Macclesfield* C. decreed an account, and that *A.* ſhould be allowed on diſcount what was due to him from *B.* and his coſts [k]. And his Lordſhip ſaid, that though

h 2 Eq. Abr. 9. pl. 8. 1 P. Wms. 325. 2 P. Wms. 128. 1 Atk. 228. cited 8 Vin. Abr. 560. Blac. R. 653.

i Prec. Cha. 580.

k Cooke's B. L. 608.

generally ſtoppage was no payment, yet in caſes of this nature, where it appeared that the mutual dealings between the inteſtate and plaintiffs were carried on for ſeveral years in this manner without payment of money on either ſide, it was a ſtrong preſumption of an agreement to that purpoſe, and that otherwiſe they would not ſo long have continued their dealings: that it was the conſtant uſage between merchants and traders. That the ſtatute of bankrupts directs accounts to be taken in ſuch manner, that if there be but the leaſt handle for directing an account, ſo as to ſet off the other's debts, it ought to be done; as if even in the caſe of a bond the intereſt had not been paid, but caſt up and allowed in goods, this would intitle them to retain the whole againſt each, as the account ſhould come out[l]. For a man cannot ſtop his *rent* for money owing to him, or a *bond* towards ſatisfaction of a ſimple *contract debt*. *Per* Lord *Macc'e field*, *ibid.*

Four bookſellers entered into partnerſhip for carrying on a joint trade[m], and being then in *Holland*, according to the cuſtom of the country, appeared before a Notary, and executed articles of copartnerſhip, declaring jointly and

[l] 1 Prec. Cha. 582.

[m] 2 Eq. Ca. Abr. 111.

ſeparately,

ſeparately, that each had advanced 24,600 guilders, total 98,400 guilders, which ſum was to pay all the debts they had then contracted, as mentioned in an inventory; but no debts ſhould be paid not mentioned in the ſaid inventory, nor any debts which either of the copartners might contract on his own private account: that a ſum agreed on between them ſhould be allowed for maintenance; and that all loſs and gain ſhould be equally ſhared and borne, with other uſual covenants.

The copartnerſhip was carried on from *Nov.* 1725 to *May* 1728, when one of the partners, for a ſum agreed to be paid him, quitted and releaſed his claim to the other three, between whom the articles were continued and carried on, on the firſt footing; and one of them was intruſted with the goods in ſhop and warehouſe.

But he became profuſe, and embezzled the copartnerſhip ſtock, and applied the ſame to his own uſe, and ſuffered the partnerſhip debts to be unpaid; and having contracted private debts on his own account, became a bankrupt, and a ſeparate commiſſion was taken out againſt him. The meſſenger took poſſeſſion of the partnerſhip goods, and the commiſſion-

ers executed an aſſignment to the defendants, who in conſequence thereof took poſſeſſion of the partnerſhip goods and books, and received ſeveral of the partnerſhip debts, and were getting in the reſt, with an intention to apply them to the payment of the ſeparate creditors; whereas the goods are copartnerſhip goods, and ought to be applied to the copartnerſhip debts, and to make the plaintiffs ſatisfaction for what the bankrupt had embezzled for his own ſeparate uſe, and the reſidue to be divided into equal parts, two thirds to the plaintiffs, and one third to the bankrupt, to which he is entitled, and is to be part of his ſeparate eſtate. This was the prayer of the plaintiff's bill, and that the defendants might be reſtrained from ſelling any part without the plaintiff's concurrence.

The aſſignees admit the bill, and the articles, that they have taken poſſeſſion and ſold ſome of the ſtock without conſent of the plaintiffs, and ſet forth an account in the ſchedule to their anſwer, of the ſtock, and ſubmit to apply the eſtate as the Court ſhall direct; and his Lordſhip was pleaſed to decree as follows:—

1ſt, That it ſhould be referred to the Maſter to take an account of the partnerſhip debts received by the plaintiffs in *Holland*.

2d, To take an account of the partnerſhip eſtate in *England*, received by the aſſignees, or any for their uſe.

3d, To take an account of the partnerſhip debts owing by the bankrupt and the plaintiffs.

4th, To cauſe an advertiſement for the joint-creditors of the bankrupt and the plaintiffs to come in and prove their debts.

5th, To take an account of what embezzlements the bankrupt has made of the copartnerſhip eſtate; and in taking accounts, plaintiffs and defendants to be examined on oath, to produce all books, papers, &c. and to have all juſt allowances.

6th, That what the Maſter ſhall certify the copartnerſhip debts ſhall amount to, ſhall, in the firſt place, be paid by the plaintiffs and defendants to the joint-creditors in proportion to their debts, as far as the copartnerſhip eſtate in their hands will extend.

7th, That if it ſhall appear any of the partnerſhip eſtate remains in the plaintiffs and defendants hands, after the partnerſhip debts are paid, then the Maſter to divide the ſame into three parts.

8th, And the plaintiffs are to take two thirds, and out of the bankrupt's one third part, they are to take what it ſhall appear he has embezzled of the partnerſhip eſtate.

9th, And if there ſhall be any reſidue of the bankrupt's third part, after the partnerſhip debts, and the bankrupt's embezzlements are ſatisfied, then the ſame is to be paid to, or retained by the aſſignees for the benefit of the bankrupt's ſeparate creditors.

10th, The Maſter may ſtate any thing ſpecially; and all parties are to be paid their coſts of this ſuit out of the copartnerſhip eſtate, to be taxed by the Maſter.

Items in a partnerſhip account, relating to the particular intereſt of a book-keeper, will not be ſupported in a court of equity [n].

[n] Atk. 141.

Lord

Lord Chancellor *Hardwicke*. "Though this Court have gone a good way in ſupporting a book of accounts which relates to a partnerſhip, yet I do not know any inſtances where they ſupported *items* in ſuch a book that relate to the particular intereſt of the officer, deputed by the partners, to keep this general book of account ſeparate from the partnerſhip affairs."

If *A.* and *B.* have a general running account, conſiſting of bills drawn by *B.* on *C.* in favor of *A.* and of bills and other ſecurities depoſited by *A.* with *B.* and upon the failure of *B.* and *C.* *A.* is obliged to take up the bills received by him from *B.* whereby the balance of the accounts is in favour of *A.* ſtill he cannot maintain trover for the bills depoſited by him with *B.* unleſs they were ſpecifically appropriated to anſwer *B.*'s drafts on *C.* in favor of *A.* and depoſited for that purpoſe expreſsly [o]. And it hath lately been ſo decided in the caſe of *Bent* and Another v. *Puller* and Others, aſſignees of *Caldwell* and Co. [p]

[o] 5 Term Rep. 494.

[p] Vide Tooke v. Hollingſworth, 5 T. R. 215.

Where perſons in trade have been connected in various partnerſhips, and a joint commiſſion taken out againſt them all, an order has been made for keeping diſtinct accounts of the different partnerſhips, as well as the ſeparate eſtates of each partner [9].

In 1771, *Thomas Petit* had ſeparate creditors.

In 1772, *Petit* and *Flight* became partners.

In 1781, *Petit*, *Flight* and *Runnington* became partners.

In *November* 1785, a commiſſion of bankrupt iſſued againſt the laſt three.

This was a petition for ſeparate accounts of the three eſtates. Though the Court did not know any inſtance, of dealing in the firm of two partners forming part of the firm of three, the prayer of the petition was granted, and it was ordered that it be referred to the major part of the commiſſioners, named in the commiſſion iſſued againſt the ſaid bank-

[9] Ex parte Marlin, 2 Bro. 15.

rupts,

rupts, *Thomas Petit*, *John Runnington*, and *Richard Flight*, to keep diſtinct accounts of the joint eſtate and effects of the ſaid bankrupts, *Thomas Petit*, *John Runnington*, and *Richard Flight*, and of the joint eſtates and effects of the ſaid *Thomas Petit*, and *Richard Flight*, and of the ſeparate eſtates and effects of each of the ſaid bankrupts; and that the ſeveral creditors on each of the ſaid ſeveral eſtates, be admitted to prove their reſpective debts under the ſaid commiſſion againſt the ſaid bankrupts, *Thomas Petit*, *John Runnington*, and *Richard Flight*; and that each of the ſaid reſpective eſtates be applied, in ſatisfaction of the creditors of each reſpective eſtate, after full payment and ſatisfaction of the debts on ſuch eſtate, be carried over to and conſtitute part of the joint eſtates of the ſaid bankrupts, and the coſts of this application to be paid out of the joint eſtates of the ſaid three bankrupts; and the coſts of keeping the ſaid ſeveral diſtinct accounts were directed to be borne and paid out of each of the ſaid reſpective eſtates, according to the proportions which in the judgment of the ſaid commiſſioners, the ſame ought to be borne and paid by each of the ſaid eſtates,

But,

But, on the other hand, when there have been various partnerſhips, and a joint commiſſion is taken out againſt one firm, in which ſome of the parties were not engaged, there can only be the common order for keeping the diſtinct accounts of the joint and ſeparate eſtate; therefore[r], when it appeared, that previous to *July* 1790, *James Niblock* carried on a ſeparate trade, and contracted ſeparate debts; and that in the month of *July* 1790, he entered into copartnerſhip with one *Richard Cook*, and continued in ſuch copartnerſhip until the month of *April* 1791, having contracted debts in their ſaid copartnerſhip, and amongſt others to the petitioners.

In *April* 1791, *Niblock* and *Hunter* became copartners, which partnerſhip was diſſolved in *July* of the ſame year. *Niblock* and *Hunter* were indebted to the petitioners.

On the 30th of *July* 1791, a commiſſion of bankrupt iſſued againſt *Niblock* and *Hunter*.

Niblock and *Hunter*, at the time of their bankruptcy, were in poſſeſſion of ſtock in trade, part of which was the property of *Nib-*

[r] Ex parte Parker, 22d Dec. 1791. Cooke 314.

lock

lock before his having any partnerſhip, part was property acquired during the partnerſhip of *Niblock* and *Cook*, and other part during the partnerſhip with *Niblock* and *Hunter*.

The object of the petition was to arrange the different funds, that is, to allot to the ſeparate creditors of *Niblock*, before his entering into partnerſhip, the property he then poſſeſſed; to the creditors of *Niblock* and *Cook*, the property acquired by that firm; and to the creditors of *Niblock* and *Hunter*, their joint fund.

The Lord Chancellor *Thurlow* was of opinion, the only order that could be made, was that for keeping diſtinct accounts of the joint and ſeparate eſtates; and ſaid, the creditors of *Niblock* and *Cook* might come as ſeparate creditors under the order.

In bankruptcy, the ſtat. 5 *Geo.* 2. *c.* 30. *ſ.* 28. directs that, where it ſhall appear to the commiſſioners that there has been mutual credit given by the bankrupt, and any other perſon, or mutual debts between the bankrupt, and any other perſon, at any time before ſuch perſon became a bankrupt [s], the com-

[s] Buller 181.

miſſioners,

miſſioners, or the aſſignees of the bankrupt's eſtate, ſhall ſtate the account between them, and one debt may be ſet againſt another; and what ſhall appear to be due on the balance, and no more, ſhall be claimed, or paid, on either ſide. And where there are mutual demands, a defendant upon an action at law may as well ſet off upon 5 *Geo.* 2. (the Bankrupt Act) as in common caſes, under 2 *Geo.* 2.

Thus in the caſe of *Lock* v. *Bennet* [t], under the clauſe in 5 *Geo.* 2. *c.* 30. *ſ.* 29. *viz.* "No more ſhall be claimed and paid than "appears to be due on either ſide, upon a "balance of *accounts* ſtated." Where there were mutual demands between a creditor and a bankrupt, the Maſter of the Rolls was of opinion, that upon an action at law the defendant might ſet off his demand againſt the plaintiff, as is done in other caſes by virtue of the ſtatute of 2 *Geo.* 2. *c.* 22. *ſ.* 13, and 8 *Geo.* 2. *c.* 24. *ſ.* 6. and that there is no occaſion to come into a court of equity, to pray an injunction to a ſuit at law, and that the plaintiffs at law may account. *Vide Green's* Spirit of Bankrupt Laws.

[t] 2 Atk. 49.

Where

Where perſons have mutual dealings, ſigning the account is not neceſſary to make it a ſtated one, but it is keeping it any length of time without making an objection, which binds the perſon to whom it is ſent.

Thus in the caſe of *Willis* v. *Jernegan*[u].

Lord Chancellor *Hardwicke*. There is no abſolute neceſſity that an account ſhould be ſigned by the parties who have mutual dealings, to make it a ſtated account; for even where there are tranſactions, ſuppoſe between a merchant in *England*, and a merchant beyond ſea, and an account is tranſmitted here from the perſon who is abroad, it is not the ſigning which will make it a ſtated account, but the perſon to whom it is ſent keeping it by him any length of time, without making any objection, which ſhall bind him, and prevent his entering into an open account afterwards.

And an account in partnerſhip trade ſhall not be inſpected after the laſt balance, as was decided in the caſe of *Beak* v. *Beak*[x].

Where a balance of accounts was ſtruck between partners, on the diſſolution of their part-

[u] 2 Atk. 251.

[x] Rep. in Cha. 190.

nerſhip,

nerſhip, it was ruled in the caſe of *Moravia* v. *Levi* [y], that an action of *aſſumpſit* would lie for that balance. In that caſe the plaintiff and defendant had entered into articles of partnerſhip, which contained a covenant to account at certain times; and a demand aroſe on the balance ſtruck, which it was proved the defendant expreſsly promiſed to pay; an objection was taken that the action ſhould have been *covenant*, but it was ruled that the action well lies, as founded on the expreſs promiſe. And this rule may be ſaid to apply *a fortiori* where the balance was ſtruck on the diſſolution of a partnerſhip, and an account ſtated, containing ſuch balance, together with other articles not connected with it.

Thus in the caſe of *Foſter* v. *Allanſon* [z], where two enter into articles of partnerſhip for 7 years, in which is a covenant to account yearly, and to adjuſt and make a final ſettlement at the expiration of the partnerſhip, and they diſſolve the partnerſhip before the 7 years are expired, and account together, and ſtrike a balance which is in favor of the plaintiff, including ſeveral *items* not connected with the partnerſhip, and the defendant promiſes

y 2 T. R. 438.

z 2 T. R. 479.

to

to pay it, an action of *aſſumpſit* lies on ſuch expreſs promiſe. It is no defence to an action for a debt due, that the plaintiff is a trader, and has committed an act of bankruptcy of which the defendant had notice, no commiſſion having iſſued nor proceedings had for that purpoſe: for though voluntary payments under ſuch circumſtances are not expected, yet payments enforced by coercion of law are valid againſt the aſſignees, in caſe any commiſſion ſhould afterwards be taken out.

This was an action on an account ſtated, and other common counts. Plea, the general iſſue.

On a rule to ſhew cauſe why the verdict which had been obtained by the plaintiff in this cauſe at the laſt *York* Aſſizes, before *Perryn* B. ſhould not be ſet aſide, and nonſuit entered; it appeared that in *January* 1785, the plaintiff and defendant had entered into articles of copartnerſhip for ſeven years, in which there was a covenant to ſettle yearly at *Chriſtmas*, and to adjuſt and make a final ſettlement at the expiration of the partnerſhip, when the ſtock and profits were to be equally divided, and general releaſes given.

In

In *April* 1785, the plaintiff committed an act of bankruptcy, which was known to the defendant, but no commiſſion had ever been taken out on it. In *February* 1786, the parties came to an agreement that the defendant ſhould carry on the buſineſs alone; and they then came to a ſettlement of accounts, in which ſeveral *items* were included not relating to the partnerſhip account, and the balance being found in favor of the plaintiff for 140 *l.* the defendant promiſed to pay it.

The motion to ſet aſide the verdict was made on two grounds: firſt, That the action ſhould have been covenant, and not *aſſumpſit*. Secondly, that the plaintiff having committed an act of bankruptcy which was known to the defendant, the latter was not warranted in paying him the money, as he would be anſwerable again to the aſſignees, if at any time a commiſſion ſhould be ſued out.

On the day for ſhewing cauſe the Court deſired to hear *Cockel* Serjeant, and *Holroyd*, in ſupport of the rule.

The proper remedy in this caſe was by action of covenant; for the parties had covenanted to ſettle accounts and pay the balance, and

and the rule is that a plaintiff cannot bring an action of *aſſumpſit* if he has a remedy of a higher nature. The ſtating of the account does not change the nature of the debt or of the remedy. In *Drue* v. *Thorne*, the action was brought againſt the huſband alone on an account ſtated, and for goods ſold; a ſpecial verdict was found, ſtating, that the defendant's wife, when ſole, was indebted to the plaintiff for goods, and that after her marriage with the defendant they accounted with the plaintiff, and a balance was found due to him which the defendant promiſed to pay. There it was held that the ſubſequent account did not alter the nature of the debt, and as that was originally due from the defendant's wife, judgment was given againſt the plaintiff becauſe the wife was not joined. In *Herrenden* v. *Palmer*, adminiſtratrix, the declaration was on an account ſtated between the plaintiff and defendant, on which the latter was found indebted as adminiſtratrix, and in her own right. The Court held the action did not lie againſt the defendant notwithſtanding the account ſtated, becauſe the demand included two rights which could not be joined.

So in *Bull* v. *Palmer*, where the plaintiff declared in *aſſumpſit*, ſetting forth that the

defendant had accounted with him, as executor of *J. S.* and on that account had been found in arrear, and had promiſed to pay him: *non-aſſumpſit* being pleaded, the plaintiff was nun-ſuited; and on motion afterwards it was held that he ſhould not pay the coſts, for the action was in right of his executorſhip, and the money, if recovered, would have been aſſets. Again it was held in *Cowp.* 129, that a promiſe by a defendant to pay debt and coſts in conſideration that the plaintiff would ſtay execution under a judgment recovered is not a ſufficient conſideration on which to raiſe an *aſſumpſit:* it was ſaid by Lord *Mansfield*, to be turning a judgment debt into a debt upon ſimple contract. All theſe caſes tend to ſhew that the ſtating the account in this caſe did not ſuperſede the original right of action, but that the covenant was ſtill in force. Then the rule applies that *aſſumpſit* will not lie where there is a remedy of a higher nature. Beſides, if the plaintiff were to recover in this action, and were to ſue upon the covenant afterwards, the judgment recovered in this action could not be pleaded in bar, 1 *Burr.* 9. Secondly, the defendant would be anſwerable to the aſſignees for this money, in caſe any commiſſion of bankrupt ſhould hereafter be taken

out

out upon the act of bankrupty committed by the plaintiff, of which the defendant has notice.

It was lately held by the Court in the caſe of *Vernon* v. *Hankey*, that after an act of bankruptcy committed, no payment to the bankrupt can be protected, if made by a perſon having notice of the act of bankruptcy. That doctrine was founded upon the principle, that the bankrupt is not a free agent, and after the act of bankruptcy has not the legal diſpoſition of any part of his property. Then, if the money could not have been paid by the defendant voluntarily, it follows of courſe, that payment cannot be compelled by any action. For otherwiſe this ſtrange abſurdity and injuſtice will ariſe, that although a debtor, who has knowledge of an act of bankruptcy committed by his creditor, is willing to act *bonâ fide*, and to diſcharge his debt honeſtly, yet he muſt neceſſarily be compelled to bear the expence of an action in order to ſecure himſelf, which may be greater than the whole amount of the demand. And even ſuffering judgment to go by default would not protect him; for if it be a good objection to make, he would be bound to

take it; otherwiſe the aſſignees might recover the debt from him a ſecond time.

Aſhhurſt J.—There is no foundation for this application on either of the grounds mentioned by the defendant's counſel. It is firſt objected to the form of the action, that an account ſtated will not lie, becauſe part of that account aroſe on a partnerſhip tranſaction, and that as to that the plaintiff has a remedy of a higher nature. But by the ſtating of the account and introducing other articles not relating to the partnerſhip, the nature of the demand is changed, and a new cauſe of action aroſe, independant of the articles of covenant. Both parties by agreement conſolidated the demand; and the defendant muſt be taken to have thereby given his conſent to conſider this as a new debt on an account ſtated. Beſides, it is for the defendant's benefit; and it is extraordinary that he ſhould inſiſt on being harraſſed with two actions, when the whole demand may be recovered in one. There appears to be as little weight too in the ſecond objection. It is objected that the plaintiff cannot maintain this action, becauſe he committed an act of bankruptcy ſo long ago as in the year

1784,

1784, though it was not followed up by a commiſſion, nor by any ſubſequent ſteps to obtain one. If this objection were to prevail, it would equally hold at any diſtance of time, though it were never in the contemplation of any creditor to ſue out a commiſſion. But I think that, apart from that conſideration, it does not lie in the defendant's mouth to make the objection. Where a perſon pays voluntarily with notice of the bankruptcy, there the rule holds; but not where he pays by the coercion and judgment of a Court of Law. An act of bankruptcy cannot not over-reach a judgment recovered. If indeed it were by colluſion, that might alter the caſe. But there is no pretence for ſaying that there is any colluſion in the preſent caſe.

Buller J.—The firſt queſtion is, Whether this action can be maintained in its preſent form. The parties entered into articles of co-partnerſhip, in which there is a covenant to adjuſt and make a final ſettlement at the expiration of the term. *Primâ facie* therefore the plaintiff was entitled to bring an action on the covenant: if it reſted there, the objection muſt have prevailed. But on the diſſolution of the partnerſhip, the parties

ſettled an account. And it is to be obſerved, that the account was not confined to matters relating to the partnerſhip, but it includes other articles for which covenant will not lie. Therefore when the defendant promiſed to pay the balance, there was an end of the covenant. And even if no other articles had been introduced into the account but thoſe relating to the partnerſhip, I ſhould ſtill be of opinion that *aſſumpſit* would lie. For the queſtion then would be, Whether a previous partnerſhip being diſſolved, and an account ſettled, is or is not in point of law a ſufficient conſideration for a promiſe? I have no difficulty in ſaying that it is. Now here there was an expreſs promiſe by the defendant to pay the balance; and therefore the caſe cited from *Alleyn* does not apply; for in that caſe there was no expreſs promiſe. It is objected that the judgment in this action could not be pleaded to an action brought on the covenant: but I think it might, if pleaded with proper averments. For a plaintiff cannot recover a double ſatisfaction: if he has recovered a judgment in one form of action, he cannot afterwards recover in another for the ſame cauſe of action. With reſpect to the other objection, in ſupport of which the caſe of *Vernon* and *Hankey* is cited; there the payment

payment was made voluntarily with knowledge of an act of bankruptcy, which was followed up by a commiſſion. The aſſignees can only recover where the payment has been voluntary, and with notice: but in the preſent caſe there has been no commiſſion, no docquet was ſtruck; neither was there any intention to ſue out a commiſſion; and the defendant will not be conſidered to have paid this demand voluntarily. If indeed there were any fraud, by the defendant's colluding with the bankrupt in ſuffering a judgment to be recovered againſt him, that would be a different caſe. But there is no fraud in this caſe; the defendant has no legal defence; and the action is right in point of form.

Groſe J. declared himſelf of the ſame opinion on both points.

Rule diſcharged.

By the common law none could be charged in account, but as guardian in ſocage, bailiff, or receiver, except in favor of merchants, and for the advancement of trade, and by the law of merchants, one naming

himſelf merchant, might have an account againſt another naming him merchant, and charge him as his receiver a. And altho' actions of account may be brought in ſome caſes by one partner againſt another, yet ſtill are matters of account thought more properly cognizable in equity than at law, as the party can have a diſcovery of all books, papers, and writings, together with the benefit and advantage of the defendant's oath. But ſince the practical arts of merchants and traders are beſt underſtood by thoſe who are moſt ſkilled in the ſcience of merchants' accounts, perhaps the readieſt way to adjuſt differences between partners is to refer all matters in diſpute to perſons in their own line to ſettle accounts between them. And we have the higheſt authority for adopting this plan, becauſe the Houſe of Lords, in matters of account which are intricate, refer it to two merchants named by the parties, to conſider the caſe, and report their opinions upon it.

Thus in the caſe of *Gyles* v. *Wilcox* and Others b.

a 1 Inſt. 372. a. 11 Co. 89.

b 2 Atk. 144.

Lord

Lord Chancellor *Hardwicke*—The Houſe of Lords very often, in matters of account which are extremely intricate and perplexed, refer it to two merchants named by the parties, to conſider the caſe, and report their opinions upon it, rather than leave it to a jury.

CHAPTER XII.

As between Partners and Third Persons.

MERCHANTS and traders know of no difference between dealing with an individual or a co-partnership firm, and all partners are bound by what any one of them does in their joint trade or business, for, *quoad hoc*, each partner must be considered as an authorised agent for the rest, both by the common law, and the law-merchant.

Thus where two partners agreed to *borrow* a sum of money of a third person, but only one gave a bond, and the other witnessed it, the money was afterwards entered in the cash-book of the partnership; upon a bankruptcy happening, a joint commission was taken out, and the obligee named in such bond was considered entitled to come in and prove his debt under the joint commission [a].

So likewise it hath been ruled that if two partners agree to *pay* a sum of money to a third person, tho' out of their own private cash,

[a] 1 Atk. 225.

they

they muſt be jointly ſued. Thus it was held in the caſe of *Byers* v. *Dobey*, where there was a contract made by two partners to pay a certain ſum of money to a third perſon *equally* out of *their own private caſh*.

This was an action in *aſſumpſit* [b] for the uſe and occupation of a ſhop, counting-houſe, and chambers, part of a meſſuage, with the appurtenances, *&c. quantum meruit*, money paid, laid out, and expended, money lent and advanced, money had and received, damages 200*l.*

Plea in abatement, "That the promiſes, *&c.* if any, were made by the defendant and one *George Bethell* jointly, and not by the defendant only, *&c.*"

Replication, That they were made by the defendant only, and not by him and the ſaid *George* jointly, *&c.* On which iſſue was joined, and a verdict found for the defendant. The material facts of the caſe were theſe: By articles of partnerſhip entered into in 1774, between *David Humphries* of the one part, and *Richard Byers* (huſband of the plaintiff) *John Dobey* (the defendant), and

[b] H. Blackſt. Rep. 236.

George

George Bethell of the other part; it was agreed, amongſt other things, that *Byers*, *Dobey*, and *Bethell*, ſhould carry on in partnerſhip the trade of a hoſier for 14 years, and purchaſe the ſtock in trade, utenſils, and fixtures of *Humphries*: that *Humphries* ſhould grant to *Byers* a leaſe of the houſe, *&c.* where the buſineſs was carried on for twenty-one years, at the rent of 50 *l.* clear of all taxes, payable quarterly, by and out of the *private caſh* of *Byers*; in which leaſe, a room ſhould be reſerved for the uſe of *Humphries*, during his life, and after his death for the uſe of *Byers*; that the buſineſs ſhould be carried on by *Byers*, *Dobey*, and *Bethell*, in the ſhop and other parts of the houſe as it had before been done by *Humphries*; that *Byers* and his family ſhould live in the houſe; that *Byers* ſhould during the partnerſhip, as a compenſation for the uſe of the ſhop and premiſſes, *be paid equally* by *Dobey* and *Bethell out of their own private caſh* 25 *l.* yearly, by quarterly payments, and that they ſhould pay *Byers a moiety of all taxes whatſoever*, for, or on account of, ſuch houſe and premiſſes: that if either of the partners ſhould die and leave a widow, *ſhe ſhould, if ſhe choſe, be taken into the partnerſhip* for the remainder of the term: that if *Byers* ſhould leave a widow,

widow, and ſhe ſhould continue in the buſineſs with the ſurviving partners, *then ſhe ſhould hold the ſaid houſe upon the ſame terms and conditions* as he would have holden it, if he had been living, *&c.*

Byers died in 1778; his widow, the plaintiff, continued in the partnerſhip with the defendant and *Bethell*, till the expiration of it, when ſhe brought this action to recover 12*l.* 10*s.* half the annual rent of 25*l.* (for the uſe of the houſe, &c. which was to be paid equally out of the private caſh of the defendant and *Bethell*, according to the articles), together with the rent for part of a year preceding the expiration of the partnerſhip, and half of one moiety of the taxes, as the defendant's ſhare under the articles.

A rule having been granted to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial granted;

Bond Serj. ſhewed cauſe, and contended that the words "*to be paid equally*," made *Dobey* and *Bethell* joint tenants, and not tenants in common. This conſtruction would be put on the like words in a deed; and if words of grant be thus conſtructed, ſo alſo ought

ought words of render. Although in wills and deeds of conveyance under the ſtatute of uſes theſe words would make a tenancy in common, yet in deeds at common law they make a jointenancy. 1 *Salk.* 390. *Ward* v. *Everard.*

Watſon Serj. for the plaintiff argued that as the money was agreed to be paid "out of the private caſh" of *Dobey* and *Bethell*, it was to be paid by them ſeparately, and not out of the joint ſtock. There could be no joint private caſh: the expreſſion, to be paid equally, could only mean that each ſhould pay a moiety of 25 *l.* and the words *private caſh*, ſhew that they were individually anſwerable.

Lord *Loughborough.* If one of them had died, would *Byers* have been entitled only to 12 *l.* 10 *s.*? The intereſt in the trade would have ſurvived, yet according to the argument of the plaintiff, though that intereſt would have ſurvived to the partnerſhip, *Byers* would have been reduced to 12 *l.* 10 *s.* It was in its nature a joint undertaking.

Gould and *Heath* J. of the ſame opinion.

Wilſon

Wilſon J.—The words *private caſh*, could only mean that the rent ſhould not be paid out of the partnerſhip ſtock, but the contract was joint between *Dobey* and *Bethell*, as relating to a third perſon.

Rule diſcharged.

In a firm or company where the partners are jointly concerned in any trade or buſineſs, the books are kept in the name of the whole, and the ſtock being joint, it is underſtood by merchants that there can be no other method of ſtating any occurrence, that can happen in trade between the partnerſhip and third perſons, otherwiſe than if carried on by a ſingle perſon, the company being relatively ſo conſidered by aſſuming a title which includes the whole; therefore the mode of traffic muſt in all reſpects be conſidered the ſame between partners and third perſons, as with an individual merchant and the world. And in all legal proceedings by or againſt partners reſpecting any joint contract or undertaking with third perſons, it is neceſſary that the partners ſhould be joined, otherwiſe advantage may be taken of the omiſſion.

Thus it was ruled in the caſe of *Legliſe* v. *Champante* [c]. Where there is a partnerſhip

[c] 2 Stra. 820.

demand,

demand, *all the partners ſhould join in the action*, for the contract and undertaking is joint; and if in ſuch caſe one partner only brings the action, the defendant may take advantage of it at the trial, and nonſuit the plaintiff; for the contract is not the ſame: but in the caſe of a tort, this muſt be pleaded in abatement.

Therefore, in the caſe of *Graham* v. *Robinſon*[d], where the plaintiffs were partners with two other perſons of the name of *Grant*; and they were joint owners of a privateer which cruiſed in company with the defendants, under an agreement to ſhare the prizes equally. They took a prize in the *Mediterranean*, which was condemned at *Minorca*, and divided the money ariſing from the ſale: the ſentence there was afterwards reverſed here, and reſtitution ordered: upon which the *plaintiffs alone* paid the whole money, (their partners having become bankrupts) and now ſued the defendants for the moiety, and they were nonſuited; for if the money was partnerſhip property, the action ſhould have been *in the name of all the partners*; if it was their own, *each* ſhould have had his own action.

Yet, it is held that after a *ſeverance* one alone may ſue. As in the caſe of *Garret* v.

[d] 2 Term Rep. 282.

Taylor e, where three had employed the defendant to ſell ſome timber for them, in which they were jointly concerned; two of them he had paid their exact proportion, and they had given him a receipt in full of all demands; *the third now brought his action for the remainder, being his ſhare*; and it was objected, that as this was a joint employment by three, one alone could not bring his action: but it was ruled by Lord *Mansfield*, That *where there had been a ſeverance*, as above ſtated, that one alone might ſue.

So it was held in *Kirkman* v. *Newſtead* f, where the action was for the uſe and occupation of a houſe, it appeared that the houſe was the property of ſix ſeveral tenants in common; to all of whom, except the plaintiff, the defendant had paid his rent: and this action was for his ſhare of the whole rent. It was objected that one tenant in common alone could not bring this action, but that all ought to join: but Lord *Mansfield* overruled the objection, and the plaintiff recovered.

Upon an *indebitatus aſſumpſit* againſt ſeveral, a joint debt on contract muſt be prov-

e Sitt. G. Hall, Trin. 4 G. 3. MSS. Eſp. 117.

f Sitt. Weſtm. M. 1776. MSS. Eſp. 117.

ed g; for it is different in contracts from what it is in torts, which are ſeveral, and in which one alone may be found guilty.

And there muſt be either an expreſs or implied promiſe to found this action upon h.

Note i, That a promiſe before it is broken may be diſcharged by parol agreement: but after it is broken it cannot be diſcharged without deed by any new agreement, without ſatisfaction.

So k he may give in evidence on the general iſſue, that the plaintiff has a partner, for then it would not be the ſame contract. For the giſt of the action is the fraud and deluſion that the defendant has offered the plaintiff in not performing his promiſe, and therefore whatever goes to ſhew there was no contract, or that it was performed and releaſed, or that there was no conſideration, goes to the giſt of the action, becauſe there could be no deluſion or fraud to the plaintiff at the time of the action brought.

g Buller's N. P. 129.

h Ibid.

i 2 Lev. 144. Ca. K. B. 538. 1 Mod. 259.

k Buller N. P. 152.

So

So he may give in evidence that the promiſe was made by him and another jointly [l]; though in regard to this there has been ſome latitude of late in the conduct of moſt Judges, who will not nonſuit a plaintiff on ſuch evidence, unleſs it appear clearly that the plaintiff knew there were more partners than he has brought his action againſt, for he gave credit only to ſuch, and therefore the law may well raiſe an *aſſumpſit* in them only.

And in a late caſe, where two perſons were partners, and the plaintiff dealt with them as ſuch, and intitled his account "*Cole* and *Shute*," but brought his action againſt one only, and was nonſuited at the Aſſizes; the Court ſet aſide the nonſuit, and granted a new trial. *Rice* v. *Shute* [m].

This was an action brought *againſt one partner only*, upon a *partnerſhip account*.

At the trial, (which was before Mr. Juſtice *Bathurſt*) the defendant gave evidence that there was *another partner* (named *Cole*) who was *not joined* in the action, as a defendant;

[l] Segar and Randal, Mic. 24 Car. 2.

[m] Bur. 2611. 2 Black. Rep. 695. S. C.

which he ought to have been, as the plaintiff knew the fact to be ſo. Whereupon the plaintiff was nonſuited.

Mr. Serj. *Burland* moved (upon the 5th of this inſtant *May* 1770), on behalf of the plaintiff, to ſet aſide this nonſuit, and to have a new trial.

It appeared upon the Judge's report, that the plaintiff could not but *know* of the partnerſhip; for that all the letters ſhewed, and it was even ſtated upon the very account itſelf, "that *Cole* and *Shute* were partners." So that the plaintiff was *not ſurprized* by the defendant producing this *evidence* of a partnerſhip: on the contrary, he had brought his action in this manner againſt the preſent defendant alone, with a deliberate deſign to take ſome advantage of him.

The Serjeant's objection was, that this matter could *not* be *given in evidence*, but ought to have been *pleaded in abatement*.

The Court gave him a rule to ſhew why the nonſuit ſhould not be ſet aſide, and a new trial had.

Mr.

Mr. Serj. *Davy* now (on this 14th day of *May*) ſhewed cauſe.

He ſaid, it would be very miſchievous, if a perſon having a demand upon a partnerſhip ſhould be at liberty to cull out one particular partner, and bring an action againſt him alone, leaving out the reſt of the partners.

In the caſe of *Boſon* v. *Sanford*, 2 *Salk.* 440. the Court held "That *all* the part-owners of the ſhip muſt be joined:" and they gave judgment for the defendant, *becauſe* all the owners were *not* joined.

This *may* undoubtedly be *pleaded in abatement*, but it is not neceſſary that in *all* caſes whatſoever it *muſt* be pleaded in abatement: in ſome caſes, and under certain circumſtances, and partly where it is within the plaintiff's *own knowledge* "that there are more partners," it may be *given in evidence*, without pleading it in abatement.

Here, the plaintiff *knew* that *Cole* was partner with the defendant. He was not ſurprized by this evidence: he acted with his eyes open, and with a deliberate deſign to take an unfair advantage.

If the defendant had pleaded in abatement, he must have *shewn* who his partners were; and then the plaintiff, being *thus informed* who they were, must have brought a *new* action against them all. But in the present case, the plaintiff *already knew*, of his own previous knowledge, "who were the partners:" and therefore he was as much obliged to bring his action *originally* against them all, if he had come at that knowledge only by the defendant's plea in abatement. As soon as he knows who the partners are, he is obliged to bring his action against them all; however he may come at this knowledge, he cannot, after having obtained this knowledge, select one, and omit the rest. Its being pleadable in abatement shews that he cannot omit any one, if in fact there are more than one; and if he does know it before he brings his action, it is more expeditious and more reasonable, that he should join them all at first. And though it may have been heretofore holden "that it could not be given in evidence," yet that was only an opinion at *Nisi Prius*: there never has been any such determination of this Court, or any where else in your Lordship's time. And if it has been ever holden "that it was sufficient to make the *acting* partners defendants," the rule has been since established,

bliſhed, " that *all* muſt be joined, if known." He therefore prayed that the nonſuit might be recorded.

Serjeant *Burland* was proceeding to ſupport his rule, but was ſtopped by Lord *Mansfield*, as not being neceſſary.

Lord *Mansfield*.—To be ſure, a diſtinction is to be found in the books between *torts* and *aſſumpſits*: " That in *torts*, all the treſpaſſers " need not be made parties: but in actions " upon *contract*, every partner muſt be made " a defendant." Many nonſuits, much vexation, and great hindrance to juſtice, have been occaſioned by this diſtinction. It muſt have been introduced originally from the reſemblance of convenience, that there might be one judgment againſt all who were liable to the plaintiff's demand. But experience ſhews that convenience, as well as juſtice, lies the other way. All contracts with partners are *joint and ſeveral*: every partner is liable to pay the *whole*; in what proportion the others ſhould *contribute*, is a matter merely among themſelves. A creditor knows with whom he dealt, but he does not know the ſecret partner. He may be nonſuited twenty times before he learns them all; or driven

ir to a ſuit in equity, for a diſcovery "who they are." It is cruel to turn a creditor round, and make him pay the whole coſts of a nonſuit, in favour of a defendant who is certainly liable to pay his whole demand; and who is not injured by another partner's not being made defendant, becauſe, what he pays, he muſt have credit for, in his account with the partnerſhip. Upon this point, I very early conſulted the three other Judges of this Court, Mr. Juſtice *Deniſon*, Mr. Juſtice *Foſter*, and Mr. Juſtice *Wilmot*. They were all of opinion, "that the defendant ought to *plead it in abatement*; he then muſt ſay, *who* the partners are." If the defendant does not take advantage of it at the beginning of the ſuit, and plead it in abatement, it is a *waver* of the objection. He ought not to be permitted to lie by, and put the defendant to the delay and expence of a trial, and then ſet up a plea not founded in the *merits of the cauſe*, but on the *form of proceeding*. The old caſes make no diſtinction between the plaintiff's *knowing* of a partnerſhip, or not. Here, indeed, the plaintiff knew of it; but the preſent defendant was the perſon with whom he tranſacted. He muſt be allowed this, in his account with the other partners. No injuſtice is done to the defendant by allowing the plaintiff

tiff to recover, but great injuſtice is done to the plaintiff by allowing the nonſuit to ſtand; and what is ſtill worſe, a mode of litigation allowed which is highly inconvenient.

Mr. Juſtice *Aſton* concurred. He ſaid, that his Lordſhip had gone through the whole; he would not repeat what had been already mentioned, but he obſerved that there was no neceſſity for admitting it to be given in evidence, nor any inconvenience in pleading it in abatement; and the not pleading it in abatement ſeemed to be a waver of the objection.

The caſe in which Mr. Juſtice *Yates* tried the cauſe, was a contract about wood, but it was never decided here by the Court.

He took notice that upon a *joint bond* the action cannot be brought againſt one of the obligors *only*. This was the point of a caſe in *Michaelmas* Term 1750. 24 *G.* 2. in this Court, which was argued by the late Lord *Lifford:* the name of it was *Homer* v. *Moore*. [I have a note of this caſe.] *Non eſt factum* was pleaded, and the jury found it to be the deed of *both*.

Mr.

Mr. Serjeant *Hewitt* moved in arreſt of judgment, upon the face of the declaration. He acknowledged that it could not have been moved in arreſt of judgment, if it had not appeared upon the face of the declaration; but it there appeared that both had ſealed the obligation, and both were living. He owned that if it had not appeared upon the face of the declaration, it muſt have been averred. Mr. *Ford*, who was for the plaintiff, gave it up, and the judgment was arreſted.

Mr. Juſtice *Willes* and Mr. Juſtice *Blackſtone* being both of the ſame opinion,

The whole Court were unanimous that the nonſuit ought to be ſet aſide, and a new trial had.

Rule made abſolute.

Where an action is brought againſt two joint debtors, and one only appears, the creditor may have judgment for his whole debt againſt the perſon appearing, and by default, againſt the perſon who does not appear [n].

[n] 2 Atk. 307.

If

If an action is brought againſt one partner only, no advantage can be taken of the omiſſion, but by plea in abatement.

Thus in *Abbott* v. *Smith*[o]. which was a caſe on *indebitatus aſſumpſit*. On general iſſue pleaded, verdict for the plaintiff. It appeared on the trial, that the defendant *Smith* and one *Robinſon* were merchants in partnerſhip, and that partnerſhip notorious. That the dealing upon which the preſent action was founded was tranſacted between *Abbott* and *Robinſon* only, but upon the partnerſhip account, and that at the time of bringing the action, the partnerſhip was diſſolved.

Glynn, ſupported by *Walker*, moved for a new trial laſt *Michaelmas* term, becauſe it appeared upon evidence, that the action was miſconceived, and ought to have been brought againſt both the partners; wherefore he inſiſted, that the Judge who tried the cauſe, (Mr. Juſtice *Nares*), ought to have nonſuited the plaintiff.

No cauſe was ſhewn laſt term on account of the indiſpoſition of the Chief Juſtice, and

[o] 2 Black. 947.

this

this being a matter of extenſive precedent, it was wiſhed to be determined in a full Court.

And now, *Davy* for the plaintiff ſhewed for cauſe, that it had been already determined in the caſe of *Rice* and *Shute* in the *King's Bench*, *Paſch.* 10 *Geo.* 3. That where a man deals with two or more partners he may bring his action againſt any of them at his option, and his leaving out the others is only pleadable in abatement. And this caſe is ſtronger than that, for here the credit is proved to have been given to the *partnerſhip account*. And therefore as the undertakings of the partners are ſeveral as well joint, they are ſeverally liable to an action. 'Tis true there is an old caſe where the contrary doctrine is laid down, that of *Boſon* and *Sanford*, *Salk.* 440. 3 *Mod.* 321. *Shower* 29. 101. 3 *Lev.* 258. *Carth.* 58. There it was argued, that becauſe all the owners of a veſſel muſt join as plaintiffs in an action againſt a ſtranger, therefore a ſtranger muſt join them all when he brings an action againſt any of them. But this is a ſtrange *non ſequitur*. The owners themſelves know who is owner and who not: a ſtranger may not have knowledge.

knowledge. And the authority of this caſe has been ſhaken by many determinations at *Niſi Prius*, and this of *Rice* and *Shute* by the Court. It is fit that the defendant ſhall be driven to his plea in abatement, if it were only for this reaſon, that in a plea in abatement the defendant muſt name all the partners, ſo the plaintiff cannot miſtake a ſecond time. But when given in evidence on the general iſſue, the defendant may ſhew at firſt *one* other partner, the next time *two*, and ſo on, to his endleſs vexation.

Glyn and *Walker*, in ſupport of the rule, contended, that this caſe was diſtinguiſhable from that of *Rice* and *Shute*, becauſe there the action was brought againſt the *acting* partner, whereas here the dealing was with *Robinſon*, and not with the defendant *Smith*. You muſt admit notice of the partnerſhip, before you can bring action againſt a non-acting partner. That all contracts by partners are *primâ facie* joint, and require ſpecial circumſtances to make them ſeveral. It never was the opinion of the Judges in *Beſon* and *Sandford* that inviſible partners might ſtart up from time to time and perplex the cauſe: Their idea extends only to known

known and visible partners, as in the present case.

In *Lloyd* and *Green*, at *Shrewsbury* Assizes, the 4th of *April* 1767, the case was, that *Lloyd* sold some wood to one *Wilkinson*, who absconded: and *Lloyd* afterwards discovering that *Green* was a partner with *Wilkinson*, brought an action against *Green*.

Yates Justice, held that an action might lie against *Wilkinson* only, or against *Green* and *Wilkinson*, but not against *Green alone*, and that the plaintiff ought to be nonsuit: but however made a case of it: which not being set down in time was never argued. As to pleading this in abatement, it is impossible. It is a plea in chief: it denies the whole declaration, it sets up a joint contract, where the plaintiff declares on a several one: and therefore amounts to the general issue. And no instance of it can be found in the books. It would produce more fraud and confusion, than it can be supposed to remedy.

Afterwards in the same term, *De Grey* Chief Justice delivered the opinion of the Court.

There

There are two conſiderations neceſſary for the Court to decide upon in this caſe. 1. The nature of the contract. 2. The manner of the ſuit. The laſt is conſequential upon the former. The contract when made with partners, is originally a joint contract, but may be ſeparate as to its effects. Though all are ſued jointly, and a joint execution taken out, yet it may be executed againſt *one* only. Each is anſwerable for the whole, and not merely for his proportionable part. Equity muſt be called in to make the reſt contribute. A creditor, being party to the contract, is bound both by law and conſcience, to do all that is neceſſary to effectuate the contract. He may ſue one of his debtors only: but if the defendant calls on him to make all the reſt defendants, he ſhall be obliged to do it. It is juſt that it ſhould be ſo. 1. That all may aſſiſt in the defence. 2. That all may enter into a rateable contribution to pay what ſhall be recovered. 3d. To take away all colour and pretence of colluſion. Where the ſuit is only brought againſt one, the law perhaps cannot do complete juſtice in the ſame ſuit. I know of no writ of contribution. But in another ſuit, for money laid out for the other's uſe, contribution may in effect be obtained. A Court of Equity

Equity does complete juſtice at once, by calling all parties before the Court. So at law, if the defendant means to take advantage of the partnerſhip, it ought to be pleaded in abatement: elſe it is ſuppoſed to be waved. As it is for the benefit of the defendant, he ought to claim it in the earlieſt ſtage, and not put the plaintiff to the trouble of making out his caſe, and then bring this objection after. In *Boſon* and *Sandford* all the Judges agreed, that if the matter could be pleaded in abatement, it ought not to be given in evidence: and *Dolben* Juſtice held that it might be ſo pleaded.

Holt and the other two Judges doubted, becauſe it was ſaid to amount to the general iſſue by denying the point of the action. But ſurely, ſaying that another perſon contracted at the ſame time that I did, is not ſaying that I did not contract. In the caſe of joint bonds this doctrine is ſtrongly ſupported, *Whelpdale*'s caſe, 5 *Co.* 119. *Stead* and *Mohun*, *Cro. Jac.* 152. If *non eſt factum* is pleaded to an action brought againſt one obligor, proof of a joint obligor does not vitiate the action.

So in *Chapple* and *Vaughan*, 1 *Saund.* 291. 2 *Keb.* 525. reported alſo 1 *Ventr.* 34. 1 *Siderf.*

derf. 420. and *Aſcue* and *Hollingworth*, *Cro. Eliz.* 494. and *Sayer* and *Chaytor*, 1 *Lutw.* 695. is expreſs that ſuch objection is not pleadable in bar, but in abatement. It is true thoſe were ſpecialties, and this a ſimple contract. But the reaſon is analogous in both. Proof that another alſo contracted, does not prove that I did not contract. Nor is this novel doctrine, without any inſtance (as was ſaid) to be found in the books. It is as old as the Year-Book. *Mich.* 35 *Hen.* 6. 38. If one brings debt againſt another, and declares for the price of a horſe, it is a good plea in *abatement* to ſay, that the defendant and another bought the ſaid horſe. S. C. cited *Bro. t. Briefe* 37. So *Tr.* 9 *Ed.* 4. 24. *b.* Writ of debt brought againſt *B.* and plaintiff declares on a contract: the defendant ſays that the contract was made by him and one *C.* ſtill living and not named in the writ: upon which the writ abated. Afterwards *C.* dies, and a new writ is brought againſt *B.* upon the ſame contract, he ſhall be received to wage his law (which ſhews it to have been a ſimple contract) although he hath before acknowledged the contract, for he may have ſince diſcharged it. And again, *Paſch.* 10 *Ed.* 4. 5. In writ of *account* againſt me as receiver, it is a good plea that I and another

were the receivers, who is ſtill living: Judgment of the writ. For thereby I ſhall compel the plaintiff to charge another as well as me; and beſides he may have ſome matter of diſcharge of which I have no knowledge. If this be, as it is, found law; it is alſo better upon the ſcore of convenience that it ſhould be ſo eſtabliſhed, as has been already done in *Rice* and *Shute* in the King's Bench.

The caſe of *Lloyd* and *Green* was never determined as ſtated, it was only the firſt thoughts of a ſingle, though very reſpectable Judge on the circuit; and he left it to the judgment of the Court as a dubious point.

In *Boſen* and *Sanford* the Court was divided; and the three who determined the caſe went upon a falſe aſſumption, that this could not be pleaded in abatement. Had they been aware that it could, they declared that it could not have been given in evidence.

The convenience I hinted at is this: that by forcing the defendant to plead this in abatement, or wave it entirely, he cannot turn the plaintiff round more than once, by ſetting up freſh partners upon every freſh action. He is to plead the whole truth of

the

the caſe, and give the plaintiff a better writ.

If *A.* pleads a partnerſhip between himſelf and *B.* and after iſſue joined, a partnerſhip is proved between *A. B.* and *C.* this would be concluſive againſt the defendant. As for colluſion in omitting a known partner, that to be ſure is poſſible, but it follows from the nature of a joint truſt, and is not the neceſſary conſequence of the doctrine. Greater inconveniences will follow from rejecting it, than can from adopting it.

Rule for a new trial diſcharged.

Per tot. Cur.

CHAPTER XIII.

Liability of each to Creditors.

WHERE one partner is out of the kingdom, the partner before the Court ſhall pay the whole of a joint demand.

In the caſe of *Darwent* v. *Wilſon*, the queſtion was, if a bill be brought againſt one partner for a joint demand, and the other is not amenable to the Court, being out of the kingdom; whether the partner before the Court ſhall pay the whole, or one moiety of the debt?

Lord Chancellor *Hardwicke*. — "Upon conſidering this caſe, I am of opinion, that the partner before the Court ought to pay the whole. This is analogous to the proceedings in courts of law, and likewiſe in this Court; for where a defendant is out of the reach of the Court, and cannot be made to appear, it amounts to the ſame thing as if the plaintiff had taken out proceſs for want of an appearance, and carried it through the whole line of proceſs to a ſequeſtration.

In

In this caſe, it is in vain to take out proceſs, becauſe the joint debtor is out of the kingdom. An exception for want of parties, here, is in the ſame nature with a plea in abatement at law; but if you go upon the merits there, you can never take it up again: now in equity, you may take exceptions at the hearing of the cauſe, or you may demur for want of parties.

In the firſt place, What is the method of proceeding at law, in caſe of a joint demand, if one of the creditors will not join in the action? He is ſummoned and ſevered: if he will not proceed jointly after ſummons and ſeverance, then the other creditor has judgment *quod ſequatur ſolum*.

On the other hand, if there are two joint-debtors, the creditor muſt bring his action againſt both; but if one only appears, and the creditor carries it on through the whole line of proceſs to an outlawry againſt the perſon not appearing, then he may proceed ſolely againſt the other, and ſhall have judgment for his whole debt againſt the perſon appearing, and judgment only by default againſt the perſon who does not appear, which is all that he can do with regard to the latter; for as to his

goods, they are forfeited to the Crown upon the outlawry.

The proceedings upon the act for making process in courts of equity effectual against persons who refuse to appear, 5 *Geo.* 2. *c.* 25. *s.* 1. are as follows: "Upon the defendant's "not appearing, the Court may order the bill "to be taken *pro confesso*, and make such de- "cree as shall be thought just; and may "thereupon issue process to compel the per- "formance by an immediate sequestration, "or by causing the possession of the estate or "effects demanded by the bill, to be deliver- "ed to the plaintiff, or otherwise, as the na- "ture of the case shall require."

Before the act, you might carry it on through the whole line of process against a defendant, who did not appear to the sequestration, and no further; you might notwithstanding set down the cause against the other defendant, and have a decree for the whole. If you could do this before the act of parliament, where a person was in the kingdom, but obstinately refused to appear, much more ought the Court to make a decree against one partner, where the other is out of the kingdom, that an account should be taken, and

that the whole which appears to be due to the plaintiff ſhould be paid by the defendant, the partner who is brought to a hearing; and his Lordſhip ordered accordingly.

The diſcharge of a bankrupt by virtue of 4 & 5 *Ann. c.* 17. ſhall not diſcharge his partner in trade at the time he became bankrupt, but ſuch partner muſt ſtill remain liable; which was alſo confirmed by a ſubſequent act[a], in the words following, *viz.* "And "whereas a doubt has ariſen upon an act "made in the fourth year of her Majeſty's "reign, intituled, *An act to prevent frauds fre-* "*quently committed by bankrupts*, whether the "diſcharge of a bankrupt, by virtue of that "act, ſhould be conſtrued to diſcharge the "partners of ſuch bankrupt, from the ſame "debt, be it therefore further enacted and "declared by the authority aforeſaid, that by "the diſcharge of any bankrupt or bankrupts, "by force of the ſaid act, or any other acts "relating to bankrupts, from the debts by "him, her, or them due and owing, at the "time that he, ſhe, or they did become a "bankrupt, ſhall not be conſtrued, nor was "meant or intended to releaſe or diſcharge "any other perſon or perſons, who was or

[a] 10 Ann. c. 15. ſ. 3.

"were partner or partners with the ſaid "bankrupt in trade, at the time he, ſhe, or "they became a bankrupt, or then ſtood "jointly bound, or had made any joint con- "tract together with ſuch bankrupt or bank- "rupts, from the ſame debt or debts, from "which he was diſcharged, as aforeſaid, but "that notwithſtanding ſuch diſcharge, ſuch "partner and partners, joint obligor and "obligors, and joint contractors with ſuch "bankrupt and bankrupts, as aforeſaid, ſhall "be and ſtand chargeable with, and liable to "pay ſuch debt and debts, and to perform "ſuch contracts, as if the ſaid bankrupt and "bankrupts had never been diſcharged from "the ſame."

And partners may be conſidered liable to the fulleſt extent in all caſes where a commiſſion of bankrupt is awarded and iſſued againſt the copartnerſhip firm.

There is alſo a rule laid down with reſpect to creditors, as to the making of their election, in caſes where partners are jointly and ſeverally bound, which makes them individually liable; for it is decided that a bond creditor to whom the partners were jointly and ſeverally bound, may make his election

to

to come againſt the joint, or ſeparate eſtate, but not againſt both, except for the deficiency, and after the other creditors are paid. Thus in *ex parte Banks* [b],

Where a joint commiſſion only was taken out againſt two partners; the petitioner a bond-creditor to whom the bankrupts were jointly and ſeverally bound. It was held, in ſuch caſe he may make his election to come upon the joint, or ſeparate eſtate: if upon the former, he cannot come upon the latter (and ſo *vice verſa*) for the ſurplus of the debt, till the creditors of the ſeparate eſtate are firſt ſerved. And Lord Chancellor *Hardwicke* founded his order upon this reaſoning, becauſe the bond-creditors might have brought a ſeparate action at law againſt each of them, and might have had likewiſe ſeparate executions, but could not have levied his debt upon both the eſtates at the ſame time, but only for the deficiency, where one eſtate was not ſufficient to ſatisfy the whole.

And in the caſe of Lord *Craven* v. *Widdows* [c], two partners in trade put in each an equal ſtock, and agreed by covenant, that the

[b] 1 Atk. 107.

[c] 2 Chan. Caſ. 139.

ſtock

ſtock ſhould pay the debts of the ſtock, and neither of their ſeparate debts ſhould charge the ſtock, but only his own eſtate, or to that effect. They both became bankrupts, and a commiſſion iſſued againſt them both. One of them owed ſeparately more than the other. The queſtion was between the ſeparate creditors of each bankrupt, and the creditors on account of the joint ſtock; for theſe would exclude the ſeparate creditors from charging the joint ſtock, but that it ſhould ſatisfy the ſtock debts. But the Lord Keeper *North* was of a contrary opinion; for the covenant of the partners cannot bind any of their creditors, but only themſelves.

Although it is a ſettled rule, That, if one partner is an executor or truſtee, and *with* the knowledge of his copartner lends the truſt fund to the trade, it becomes a debt which may be proved againſt the joint eſtate. Yet, if one partner brings truſt money into a trade, *without* the knowledge of his co-partner, it is a breach of truſt in him, but cannot be proved as a joint debt.

Therefore on a petition *ex parte Apſey*[d], where it appeared that on the 11th of *Febru-*

[d] 3 Brown. 265.

ary

ary 1790, a commiſſion of bankrupt iſſued againſt *William Tory*, and the petitioner and *Edward Allen* were choſen aſſignees; and in *April* 1791, a joint-commiſſion of bankrupt iſſued againſt *James Allen* and *Edward Allen*, under which *Leſter* and *Hyde* were appointed aſſignees. *Edward Allen*, before the latter commiſſion, and as one of the aſſignees of *Tory*, received ſeveral ſums of money, part of his eſtate, and paid ſeveral ſums on the account; and at the time of the bankruptcy, *Edward Allen* was indebted to the eſtate of *Tory* 432 *l.* 17 *s.* 6 *d.* which he had paid and applied in diſcharge of debt, due from him, and *James Allen*, and otherwiſe in the joint trade. The petitioner applied to the commiſſioners to permit him to prove this ſum of 432 *l.* 17 *s.* 6 *d.* under the joint commiſſion againſt the partnerſhip, and the ſame being refuſed, preſented this petition to the Lord Chancellor, praying to be at liberty ſo to do.

The Lord Chancellor ſaid, in the caſe *ex parte Cleaves* [e], the partners had agreed to conſolidate the ſeparate debts, which made the difference. Here one by abuſing his truſt, advances the money to the partnerſhip, that

[e] Cooke's B. L. 316.

will

will not raiſe a contract between the partnerſhip, and the perſon whoſe money it is. And diſmiſſed the petition.

If *A.* and *B.* partners in a general trade, are bound in a bond to *J. S.* and *A.* and *B.* break off the partnerſhip, and divide their ſtock; *J. S.* the obligee in the bond knowing this, and that *A.* took upon him to pay the debts; and after a great diſtance of time brings a bill againſt the executors of *B.* yet he (*J. S.*) ſhall recover [f].

Thus *A.* and *B.* partners in a goldſmith's trade, in 1693 were bound in a bond to *J. S.* for the payment of 1000 *l.* and intereſt; which 1000 *l.* was *that* year employed in the partnerſhip trade; and in the *ſame* year they diſſolved the partnerſhip, when *A.* by ready money and his own bond ſecured to *B.* his ſhare of the partnerſhip ſtock, and took on himſelf all the partnerſhip debts, *covenanting* to ſecure *B.* from ſuch debts. *Public notice was given to all the creditors of the joint ſtock, that they were either to receive their money, or look on A. only as their pay-maſter.* *B.* died, leaving *C.* his executor, and *D.* his reſiduary

[f] Heath v. Percival, 1 Stra. 403. 2 Eq. Ca. Ab. 167. pl. 14. 630. pl. 2. 1 P. Wms. 683.

legatee.

legatee. *J. S.* in 1708 called in his money from *A.* but then continued it upon *A.*'s ſubſcribing the bond at 6 *l. per cent.* *A.* continued ſolvent till 1711, and *J. S.* might, till that time, when he pleaſed, have had his money. *J. S.* outlawed *B.*'s executors, and brought this bill againſt *D.* *B.*'s reſiduary legatee, to recover the 1000 *l.* and intereſt out of the aſſets of *B.* *A.* having in 1711 become a bankrupt, and inſolvent, Lord Chancellor *Parker*, the defendant's teſtator, being bound in a bond, he muſt lie at ſtake until the bond be paid; and though *J. S.* continued the money on the bond, this was not material, ſince it was upon the credit of both the obligors. As to the notice given by *A.* to the joint creditors to bring in their ſecurities, and that *A.* alone would be thereafter liable, that being *res inter alios acta*, could not bind *J. S.* and his changing the intereſt did not alter the ſecurity, for ſtill it was the bond of both, but that the defendant could not be liable to more than 5 *l. per cent.* for the arrear of intereſt; wherefore *J. S.* had a decree for his debt, intereſt and coſts.

[s] The executor (in truſt) being *outlawed*, and a witneſs proving that he had enquired after, but could not find him, this was thought to be a full anſwer to the objection that ſuch executor was not made a party. *Ibid.*

Co-

Copartners having a joint trade, and one of them accept a bill of exchange, if he does not pay it, an action lies againſt the other, 1 Ld. *Raym.* 175. *Pinkney* v. *Hall.*

That if two merchants are *partners* jointly merchandizing together, and the one of them ſubſcribes a bill for the payment of money by him and his *partner* mentioned therein, to another or his order, that then both the partners are bound by the ſubſcription of that ſingle perſon; and that if the perſon, to whom this bill is payable, indorſes it payable to any other perſon, that then thoſe partners ought to pay ſuch bill upon notice, to him to whom it is made payable. In this caſe [h], *J. S.* and defendant *Hall* were *partners*; and *J. S.* ſubſcribed a bill of 100 *l.* payable to *Hutchins* or his order, by himſelf and his *partner*. *Hutchins* indorſed the bill to the *plaintiff*, of which *defendant* had notice, but upon demand did not pay.

Verdict for plaintiff.

So alſo, if a bill is drawn by two, payable to *us*, "*or our order*," and ſubſcribed by both, though not in partnerſhip, they make them-

[h] 1 Salk. 126. S. C. 5 Mod. 398. S. P. 6 Mod. 36. S. P. 2 Salk. 442. S. P.

ſelves

ſelves partners by the form of the bill, to the effect of making an indorſement by one of them valid.

Thus in the caſe of *Carick* v. *Vickery*[1].

This was an action by the indorſee of a bill of exchange, which was in the following form:

"Mr. *Abraham Vickery*,

Two months after date, pleaſe to pay to us or our order the ſum of, &c.

John Maydwell.
John Maydwell."

It was indorſed thus:

"*Jon. Maydwell.*
Holloway."

The *Maydwells* were father and ſon. The indorſement was by the ſon. They were admitted not to be partners. The bill, when due, was preſented to the defendant, and accepted; and, at the time of the acceptance,

[1] Dougl. 653. n.

he

he wrote upon it a direction to his banker to pay it. The cauſe was tried, at the Sittings after *M.* 23 *Geo.* 3. at *Guildhall*, before Lord *Mansfield*, who nonſuited the plaintiff, becauſe there was not an indorſement by both the parties to whoſe order the bill was made payable. In *H.* 23 *Geo.* 3. *Howorth* obtained a rule to ſhew cauſe why there ſhould not be a new trial; and the caſe was argued on *Saturday* the 1ſt of *February* 1783, by *Wallace* and *Law*, for the defendant, and *Howorth* and *Wood*, for the plaintiff. In ſupport of the nonſuit, it was inſiſted, that it was clear, when two or more perſons are the payees of a bill of exchange, (which in this caſe the drawers were) and there is no partnerſhip between them, the indorſement of one will not bind the reſt, nor make the bill negotiable. The only reaſon for the names of both the father and the ſon appearing to this bill, muſt have been, to prevent its being paid without the joint order of both. Even if the indorſement had been ſpecially by the one, to pay for himſelf and the other, yet, without evidence of a partnerſhip, the other would not have been bound. The firſt promiſe of the acceptor was to pay to the order of two, and a new promiſe to pay to the order of one could not be raiſed, without a conſideration.

It

It would be a *nudum pactum*. Indeed, where there is a partnerſhip, the acceptance of one partner does not bind the others, unleſs the bill concerned the partnerſhip trade.

This was determined in the caſe of *Pinkney* v. *Hall* [k], The ſame thing muſt hold as to indorſements. If there is no caſe exactly on the ſubject, it is becauſe the matter has never been doubted. *Whitcomb* v. *Whiting* [l] may be cited on the other ſide; but it is not *ad idem*. The ſtatute relative to promiſſory notes only enables ſuch ſervant or agent as is uſually entruſted by the principal, to bind him by his ſignature. A partner's ſignature binds the partnerſhip upon that ground; for every partner may be conſidered as an agent for the reſt of the partnerſhip.

On the other ſide it was argued, that two perſons, by joining in the ſame bill, hold themſelves out to the world as partners, and therefore, for that purpoſe, are to be treated and dealt with as ſuch. It appears by the evidence, that the acceptance and order to the banker were after the indorſement; that order, therefore, amounted to a recognition

[k] 1 Ld. Raym. 175.

[l] Dougl. 651.

of the power of the one to bind the other. Beſides, the ſon had the cuſtody of the bill, which implied an authority from the father to negotiate it. They cited *Whitcomb* v. *Whiting*.

Lord *Mansfield*—I have looked into that caſe, and do not think it *ad idem*. The general queſtion is of great importance, *viz.* Whether an undertaking, by a bill of exchange, to pay *A.* and *B.* is an undertaking to pay *A.* or *B.*? We will, therefore, take ſome time to conſider of it. As to the order to the banker, it ſeems to me nothing more than a direction to pay to perſons properly authoriſed.

Willes Juſtice—I incline to think the order to the banker a recognition of the indorſement.

Aſhhurſt Juſtice—I do not think the order acknowledges the authority of the indorſement. If the banker had afterwards diſcovered that the indorſement was forged, he might have refuſed payment. (*Wallace* had mentioned a caſe from *Briſtol*, of a draft on Meſſrs. *Hoares*, accepted by Meſſrs. *Childs*, where that happened.)

Buller

Buller Juſtice—I think the order to the banker makes no difference. But it ſeems to me, that, when a bill goes out into the world, the perſons to whom it is negotiated are to collect the ſtate and relation of the parties from the bill itſelf. If they appear on the bill as partners, it may be of leſs public detriment to ſubject them to the inconvenience of being treated as ſuch, than to permit them to deny that they are ſo.

The Court took time to deliberate, till *Tueſday* the 4th of *February*, when Lord *Mansfield* delivered their unanimous opinion, That the *Maydwells*, by making the bill payable "to our order" had made themſelves partners as to this tranſaction.

The rule made abſolute.

At the enſuing Sittings at *Guildhall*, on *Monday* the 3d of *March* 1783, the new trial came on, before Lord *Mansfield*, and a ſpecial jury; when

Wallace for the defendant, ſtated and offered to prove, that by the univerſal uſage and underſtanding of all the bankers and mer-

chants in *London*, the indorſement was bad, becauſe not ſigned by both the payees.

Howorth, on the other ſide, objected to any evidence of that ſort, inſiſting, that the point was a queſtion of law, and had been decided by the Court.

Lord *Mansfield* ſaid, he did not think the queſtion was ſo decided as to preclude the evidence offered; and therefore over-ruled the objection.

Wallace then called Mr. *Goſling* an eminent banker, to prove the uſage; but the jury *una voce*, declared they knew it perfectly to be as he had ſtated it; and, without hearing the witneſs, found a verdict for the defendant.

In the caſe of *Whitcomb* againſt *Whiting* [m], it has been determined that an acknowledgment by one partner is ſufficient to take a caſe out of the ſtatute of Limitations as againſt the others. In this caſe there was a declaration, in the common form, on a promiſſory note executed by the defendant: Pleas;

[m] Dougl. 651.

the

the general iſſue, and *non aſſumpſit infra ſex annos*. Replication; *aſſumpſit infra ſex annos*.

The cauſe was tried before *Hotham*, Baron, at the laſt aſſizes for *Hampſhire*. The plaintiff produced a joint and ſeveral note executed by the defendant, and three others; and, having proved payment, by one of the others, of intereſt on the note, and part of the principal, within ſix years, and the Judge thinking that was ſufficient to take the caſe out of the ſtatute, as againſt the defendant, a verdict was found for the plaintiff.

On *Friday* the 4th of *May*, a rule was granted to ſhew cauſe, why there ſhould not be a new trial, on the motion of *Lawrence*, who cited *Bland* v. *Haſlerig* [n]; and this day in ſupport of the application, he contended, that the plaintiff, by ſuing the defendant ſeparately, had treated this note exactly as if it had been ſigned only by the defendant; and therefore, whatever might have been the caſe in a joint action, in this caſe, the acts of the other parties were clearly not evidence againſt him. The acknowledgment of a party himſelf does not amount to a new

[n] C. B. H. 1 & 2 W. & M. 2 Ventr. 151.

promiſe, but is only evidence of a promiſe. This was determined in the caſe of *Heylin* v. *Haſtings* o, reported in *Salkeld* p 9. 12 *Modern*; and in *Hemmings* v. *Robinſon* q, it was decided, that the confeſſion of nobody but a defendant himſelf is evidence againſt him. That laſt caſe was an action by an indorſee of a note, againſt the drawer, and the plaintiff proved the acknowledgment of a meſne indorſer that the indorſement on the back of the note was in his hand-writing; but the Court was of opinion, that this was not evidence againſt the drawer, but that the indorſement muſt be proved. It would certainly open a door to fraud and colluſion if this ſort of evidence were, in any caſe, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

Lord *Mansfield*—The queſtion here, is only, Whether the action is barred by the ſtatute of Limitations? When caſes of fraud appear, they will be determined on their own circumſtances. Payment by one, is payment

o B. R. H. 10 Will. 3.

p 1 Salk. 29. 223.

q Barnes 4to Edit. 436.

for

for all, the one acting virtually as agent for the reſt; and, in the ſame manner, an admiſſion by one, is an admiſſion by all; and the law raiſes the promiſe to pay, when the debt is admitted to be due.

Willes Juſtice—The defendant has had the advantage of the partial payment, and therefore muſt be bound by it.

Aſhhurſt and *Buller* Juſtices, of the ſame opinion.

The rule diſcharged.

The caſe of *Bland* v. *Haſlerig* (cited *ſupra*) was a joint action againſt four: the *plea*, the ſtatute of Limitations, and a *verdict*, that *one* of the defendants did aſſume within ſix years, and that the others did not; and it was held by *Pollexfen* Ch. J. *Powell* and *Rokeby* (againſt *Ventris*) that the plaintiff could not have judgment againſt that defendant who was found to have promiſed within the ſix years. But according to the principle in the preceding caſe of *Whitcomb* v. *Whiting*, the jury ought to have conſidered the promiſe of one as the promiſe of all, conſequently that all the partners were liable.

Acts ſubſequent to the time of delivering goods on a contract may be admitted as evi-

dence to ſhew that the goods were delivered on a partnerſhip account, if it were doubtful at the time of the contract: but if it clearly appear that no partnerſhip exiſted at the time of the contract, no ſubſequent act by any perſon, who may afterwards become a partner, (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods ſold and delivered; though he will be liable on the bill of exchange.

Thus in the caſe of *Saville* v. *Robertſon* and *Hutchinſon*[r].

This was an action for goods ſold and delivered, brought under the following orders of the Lord Chancellor, made upon the petition of the plaintiff and others in the bankruptcy of the defendants; "I do order that the petitioner *W. Saville* be at liberty to proſecute ſuch action at law as he ſhall be adviſed for the value of the ſaid copper, &c. in the defence to which action the ſaid bankrupts are not to ſet up their bankruptcy; and all books, &c. to be produced, &c. and all further directions on the matter of the petition are here-

[r] 4 Term Rep. 720.

by

by reſerved until after the trial, &c. Dated 2d *Auguſt* 1790." "I do order that the petitioner *W. Saville* be at liberty to try the ſaid action for goods ſold and delivered, as directed by my order made in this cauſe on 2d *Auguſt* 1790; with liberty, if the Court wherein the ſaid action ſhall be tried ſhall think fit, *to give the ſaid bills in evidence, without prejudice to the form of the action*, as now directed: and all further directions, &c. reſerved, &c. Dated 7th *May* 1791."

At the trial, a ſpecial caſe was reſerved, which ſtated as follows:—

In *April* 1787, the defendants and one *Samuel Pearce*, ſince deceaſed, and *William Robertſon*, ſince a bankrupt, entered into the following articles of agreement:—

Articles of agreement made this 19th of *April* 1787, between *J. Robertſon* and *J. Hutchinſon*, of *London*, merchants and copartners, as well on the part and behalf of themſelves as of others who have or ſhall ſubſcribe their names on the back of theſe preſents, of the one part, and *S. Pearce*, of, &c. merchant, of the other part, &c.

Whereas

Whereas the ſaid *S. Pearce* is the ſole owner and proprietor of the ſhip *Triumph*, &c. and whereas the ſaid *J. Robertſon*, *J. Hutchinſon*, *S. Pearce*, and others, who have ſubſcribed their names on the back of theſe preſents, have mutually *agreed upon a joint undertaking and riſk as to profit and loſs in a certain voyage* or maritime adventure about to be performed under the direction of the ſaid parties, who have or ſhall have a majority of intereſt therein, or of a committee appointed by them; now theſe preſents witneſs that they the ſaid *J. R.* and *J. H.* on behalf of themſelves, and all others who have or ſhall ſubſcribe, &c. and the ſaid *S. P.* for himſelf, in conſideration of the truſt which they ſeverally repoſe in each other, and alſo in purſuance of the ſaid agreement, have and do each for himſelf, his heirs, executors, &c. mutually covenant and agree with each other, &c. 1ſt, That the ſaid ſhip *Triumph*, whereof the ſaid *S. Pearce* is ſole owner, ſhall from the day of the date, and until her return from her intended voyage, be at the diſpoſal, direction, and riſk of all the parties hereto jointly, at the valuation of 3750*l.* &c. 2d, That the ſaid *J. R.* and *J. H.* by themſelves and others who have or ſhall ſubſcribe, &c. ſhall and will on or before the 24th *Auguſt* next, procure and provide

provide a cargo of goods for the ſaid intended voyage to the value of between 22,000 *l.* and 25,000 *l.* and *which goods ſhall in the judgment and opinion of the majority of the parties to theſe preſents be deemed eligible* and proper for the voyage and markets; and that the ſaid goods ſhall be furniſhed or purchaſed at the loweſt caſh prices, although not payable till the uſual period of credit is expired; the difference between the ſaid caſh terms and the given credit to be made good by giving bonds, bearing intereſt from the date of the contract of ſuch goods; and that they the ſaid *J. R.* and *J. H.* and other the perſons who ſubſcribe, &c. ſhall and will prepare and ſhip the ſaid cargo at ſuch time and in ſuch manner as the majority of the ſaid concerned, or their committee ſhall direct. That all additional out-fits of the ſhip *Triumph*, in cables, &c. which ſhe may require, &c. after the date hereof, &c. until her voyage be concluded, ſhall be on the joint account, &c. 4th, That in caſe the ſaid *S. Pearce* ſhall be deſirous to increaſe his intereſt in the *ſaid joint concern*, he ſhall be permitted ſo to do, by ſhipping on *the joint account* as many goods, over and above the goods to be ſhipped by the ſaid *J. R. J. H.* and others who ſhall ſubſcribe, &c. as he may think proper: but the

ſaid

ſaid goods ſo to be ſhipped by the ſaid *S. Pearce* are to be *ſuch articles as the majority of the concerned or their committee ſhall approve of* as proper for the voyage and market. 5th, That the ſaid 3750 *l.* together with the amount of the additional out-fits to be advanced by the ſaid *S. Pearce*, the amount of half of the premiums of inſurance to be made by the ſaid *S. P.* on the ſaid ſhip, freight and cargo, and ſuch amount of goods as the ſaid *S. P.* may ſhip on the joint account as above-mentioned, ſhall be conſidered *as the ſaid S. P.'s ſhare or capital in the ſaid joint undertaking*; and he the ſaid *S. P.* ſhall be entitled to receive the profit or bear the loſs thereon, in the exact proportion as the amount of all ſuch ſums ſhall be to the remainder or other part of *the ſaid joint concern*; and that the ſaid *J. R.* and *J. H.* and the ſubſcribers, &c. ſhall receive the profit, or bear the loſs in the like proportion as to the ſums ſet oppoſite to their ſeveral names. 6th, Provided that *S. P.* ſhall get the inſurances effected, and guaranty the ſolvency of the under-writers, if called upon; and when the policies are effected, each of the ſaid parties is to hold his own reſpective proportion thereof, to the amount of his ſhare and intereſt in the ſaid joint concern. 7th, Although the ſaid *S. P.* is to procure the

whole

whole of the ſaid inſurances on the ſaid ſhip, freight and cargo, yet only half of the premiums of inſurance ſhall be added to his intereſt in the ſaid joint concern, purſuant to the 5th article: but all the ſaid parties hold themſelves bound with him to be anſwerable for the whole amount of the ſaid premiums of inſurance, and which is to be a charge on the voyage. 8th, That *S. P.* ſhall be the ſhip's huſband to ſuperintend ſuch out-fits of the ſaid ſhip as the majority, &c. ſhall deem neceſſary. (The 9th, relates to a ſchedule of the ſhip's tackle, &c.) 10th, That all money received on account of the ſhip, &c. ſhall be paid to the ſuper-cargo on the joint account. 11th, That in caſe the ſaid *S. P.* ſhall want the aſſiſtance of the ſaid *J. R.* and *G. H.* or the ſubſcribers, &c. to procure him the loan of any money to enable him to complete the out-fits, they engage to procure him 500 *l.* to be repaid by him in manner as therein ſtipulated. (12th, Not material.) 13th, That from and after the ſaid ſhip ſhall leave the port of *London*, all the expences on the voyage ſhall be paid by the ſuper-cargo or agent for the ſaid joint concern, who ſhall be ſupplied with money for that purpoſe, or be empowered to pay the ſame out of the proceeds of the cargo. And if the ſaid ſuper-cargo,

during

during the voyage, is under the neceſſity of drawing bills on either of the ſaid parties for the ſame, or he ſhall think the drawing ſuch bills more beneficial to the joint concern than reimburſing himſelf out of the ſaid proceeds, then each of the ſaid parties intereſted in the ſaid maritime adventure ſhall bear and pay his reſpective portion of ſuch bills. 14th, That the parties hereto, or a committee, ſhall appoint officers of the ſhip. 15th, That when the ſhip is ready laden for ſea, and previous to her ſailing, *J. R.* and *J. H.* ſhall deliver an invoice of her cargo to the ſupercargo, who ſhall enter the ſame in proper books; and each party intereſted ſhall be therein credited with the amount of his reſpective accounts, and the ſuper-cargo ſhall prepare a ſtatement of the whole amount of the ſaid ſhip, out-fits, cargo, and charges, declaring the exact proportions or ſhares which each perſon hath in the voyage, which ſhall be ſigned by each of the parties, and ſhall be a voucher for aſcertaining the ſaid ſhares hereafter, in profit and loſs. 16th, That in caſe of any difference between any of the parties intereſted, it ſhall be referred to arbitration. 17th, That each party ſhall bind himſelf in the penal ſum of 2000 *l.* for the performance of the articles.— Signed and ſealed by

by *J. Robertſon*, *J. Hutchinſon*, *S. Pearce*, and *W. Robertſon*.

On the 28th *July* 1787, the following memorandum was indorſed on the ſaid articles by the ſame perſons: "Notwithſtanding what may be underſtood to be the meaning of the foregoing articles, it is hereby declared by all the parties that the minute made on the 26th *June* laſt, and ſigned by us reſpecting each of us, holding the proportions of one quarter each, that is to ſay, *Robertſon* and *Hutchinſon* one half, and *S. Pearce* and *W. Robertſon* one quarter each, it is now fully to be conſidered and underſtood that that minute is now declared null and void, and that each party whoſe name is hereunto ſubſcribed is to hold no other ſhare or proportion in the ſaid concern than the amount of what each ſeparately orders and ſhips; and which intereſt will be hereafter declared, agreeably to the true intent and meaning of this agreement. And it is further declared that the orders given for the cargo and out-fit of the ſhip, are to be each ſeparately paid; and that one is not bound for any goods or ſtores ordered or ſhipped by the other. And that the ſaid *S. Pearce* has free liberty to ſhip what goods are ſuitable for the voyage, over and above

above the ſhip and out-fit, leaving room clearly for thoſe ordered by *Robertſon* and *Hutchinſon*, and *W. R.* and it is to be underſtood that the ſhip is made over in truſt for the general concern."

In *May* 1787, the plaintiff, by the order of *Pearce*, ſupplied copper to ſheath and repair the ſhip *Triumph*, to the amount of 482 *l.* In *Auguſt* 1787 the plaintiff by the orders of *Pearce* delivered copper on board the ſaid ſhip to the amount of 938 *l.* 3 *s.* 3 *d.* which formed part of the cargo thereof.

In *October* 1787 the ſaid ſhip ſailed from *London* for *Oſtend*, and proceeded from thence to the *Eaſt-Indies* with the goods ſo furniſhed by the plaintiff, and other goods on board. In *January* 1788, *Pearce* became a bankrupt, and *Saville* proved his debt under the commiſſion againſt him; and in *February* 1788, *William Robertſon* alſo became a bankrupt.

On the trial Mr. *Kaye*, the plaintiff's attorney, and who was ſolicitor to *Pearce*'s aſſignees, ſwore that the defendant *Robertſon* told him that in *September* 1789 there had been an agreement between him (*Robertſon*) and *Pearce*'s aſſignees that he ſhould go down

to

to the coaſt to wait the ſhip's return from *India*; on her arrival he was to ſend word to the aſſignees, one of whom was to accompany him in the ſhip to *Oſtend*, and there the ſhip and cargo were to be ſold for the parties intereſted; that when the ſhip arrived, which was in *July* 1789, he (*Robertſon*) went on board, and, without ſending advice to *Pearce*'s aſſignees, carried her to *Oſtend*, and ſold her for his own and *Hutchinſon*'s benefit; that his reaſon for not keeping his engagement with *Pearce*'s aſſignees was, that he and his partner were liable to pay the whole debts for ſhip and cargo, and therefore he had poſſeſſed himſelf of the whole to anſwer thoſe debts; and if there were a ſurplus he would account to *Pearce*'s aſſignees for a proportion of it.

On the 29th of *October* 1789 the defendants accepted two bills of exchange of that date for the amount of the copper ſupplied by the plaintiff, drawn by the plaintiff payable two months after date, and ſtated to be for value delivered in copper to Meſſrs. *S. Pearce* and Co. In *January* 1790 before either of the bills was paid the defendants became bankrupts.

This caſe was argued in the laſt term by *Adam* for the plaintiff, and *Burrough* for the defendants; and again on this day by *Bower* for the former and *Beareroft* for the latter. It was admitted that the plaintiff was entitled to recover for the copper for ſheathing.

It was argued for the plaintiff, 1ſt. That the defendants were liable for the reſt of the goods, as partners, on the conſtruction of the articles, coupled with their ſubſequent acknowledgment, and their acceptance of the bills of exchange, drawn for the very goods; and theſe caſes were cited, *Abbott* v. *Smith*, 2 *Bl. Rep.* 947. *Bloxam* v. *Pell*, cited in 2 *Bl. Rep.* 998. *Hoare* v. *Dawes*, *Dougl.* 371. 3d edition; and *Coope* v. *Eyre*, *H. Bl. Rep.* 39. But 2dly, If the plaintiff could not recover in an action for goods ſold and delivered, that the defendants were liable on their acceptance of the bills; and that the Lord Chancellor intended by the ſecond order to give the plaintiff an opportunity of recovering either in the one form or the other. Theſe points were reſiſted by the counſel for the defendants; the firſt on this ground, that the defendants were not partners at the time when the contract was made; and that, though

though their ſubſequent acts might explain the original contract, if it were doubtful at the time, they could not alter the original contract againſt the intention of the parties, as expreſſed in the articles.

On the ſecond head it was ſaid, that the meaning of the order was only to permit the bills to be given in evidence to explain the intention of the parties on the whole tranſaction, but not to make the bills the foundation of the action, which was expreſsly ordered to be brought to recover the value of the copper.

Lord *Kenyon* Ch. J.—"Some of the points made at the bar admit of no doubt. It is clear that, if all theſe parties had been partners at the time when theſe goods were furniſhed, though that circumſtance were not known to the plaintiff, they would all have been liable for the value of the goods. It is equally clear that ſuch an action might be maintained againſt the dormant partners alone, unleſs they pleaded in abatement. Nor can any doubt be entertained but that, if this had been an action on the bills of exchange, the plaintiff might have recovered: there was a conſideration for them; and

being in writing, the ſtatute of Frauds would have been ſatisfied, though they were promiſes to pay the debt of another perſon. But my difficulty ariſes from the form of this action, which is for goods ſold and delivered; for I do not ſee how any act, which paſſed ſubſequent to the delivery of the goods, can have any retroſpect ſo as to alter the nature of the contract, which was not doubtful. It might have been evidence to explain it to be a partnerſhip contract, if the contrary had not expreſsly appeared. The facts of the caſe are ſhortly theſe; ſeveral perſons who had no general partnerſhip, nor any connection with each other in trade, formed an adventure to the *Eaſt-Indies*. The outfit of the veſſel was a joint concern of all the partners; and that delivers the caſe from one conſideration, namely, the parcel of copper for ſheathing the ſhip; which is admitted to be a partnerſhip concern. But beyond that I ſee no partnerſhip between the parties till all the parcels of the cargo were delivered on board; and that made it a combined adventure between all the parties. It was very properly aſked, in the argument, if they were partners when the cargo was delivered, what ſhare had *Pearce*; by the articles he was not to bring in any definite aliquot part of the cargo;

cargo; but the agreement only was that he ſhould ſhare in proportion to the part he ſhould bring in; it was optional in him whether or not he would bring in any goods; and by another part of the agreement, if he were under any difficulty in bringing in the money, the others were to lend him credit. It is true, that it was to be determined by a majority of thoſe concerned in the adventure, whether the goods, which were to be ſent to market, were or were not proper; and ſo far they all looked to each other's acts; but each of them was to bring in his ſhare only; and I cannot diſtinguiſh this caſe from that put at the bar, where ſeveral perſons were to contribute their ſeparate *quota* of money, and they applied to different ſcriveners to procure it; they could not all be liable for the capital which each ſhould borrow. At the time when this copper was furniſhed, *Pearce* ſtood in no relation whatever to the other perſons, but he alone bought the copper in his own name, without carrying to market the name of any other perſon but his own. Suppoſe the plaintiff had brought an action for this copper the inſtant it was delivered on board; againſt whom muſt the action have been brought? *Pearce* only; for he alone was anſwerable at that time. I cannot there-

fore ſee how it can be ſaid that theſe goods, which were ſold to *Pearce* only, and on his ſole credit and account, were ſold and delivered on the partnerſhip account. Afterwards indeed theſe defendants were to gain or loſe by the joint cargo; when the other goods were brought in, the partnerſhip aroſe; but each was to bring in his own particular ſtock. But in this caſe I think that the queſtion ſtops ſhort of affecting the defendants; and I cannot ſee how the plaintiff can have a right to call on the defendants, as partners, for the value of theſe goods, on a ſuppoſed contract, when the real contract between the buyer and ſeller was conſummated before the joint riſk began. Suppoſe ſeveral perſons agreed to open a banker's ſhop, and it was agreed that each partner ſhould bring into the houſe a certain ſum of money as his ſhare, it could not be contended that, if one of them were to borrow money for his ſhare, all the others would be liable for it. The great queſtion however ſtill is, Whether under all the circumſtances of the caſe, all theſe parties are anſwerable; I think they are, but they can only be adjudged to be reſponſible in another form of action, and not in this, which is an action for goods ſold and delivered. If the action had been

brought

brought upon the bills, I think they would have been liable."

Ashhurst J. This case comes before us much entangled in the form of it: but at present the inclination of my opinion is, that even in this form of action for goods sold and delivered, the plaintiff may recover. I admit that evidence subsequent to the contract cannot vary the nature of the contract, but it may explain the intention of the parties to the original contract. If the ordering of the goods by *Pearce* were the only evidence in this case, he alone would be answerable for the payment of them: but, when he bespoke them, it is clear that he did it with a view to a partnership transaction; and that this was a joint concern, was shortly afterwards explained by the memorandum of *July* 1787, which is indorsed on the articles; both of which must be taken into consideration together, in order to see the nature of the contract. The fourth, fifth, and fifteenth articles, are strong to shew that this was a partnership concern. By the fourth, *Pearce* was to be at liberty *to ship on the joint account* as many goods as he chose, provided they were such as the majority of those concerned should approve. Now if this were not intended to be a partnership

account, the reſt of thoſe concerned in the adventure could have no intereſt or concern in the goods ſhipped by him: but if they were all to ſhare in the profit and loſs of the whole adventure, then there was good reaſon why they ſhould have an opportunity of approving of thoſe goods. The fifth article ſhews this ſtill more ſtrongly; it is that the 3750*l.* &c. and ſuch amount of goods as *Pearce* may ſhip *on the joint account* as above-mentioned, ſhall be conſidered as *Pearce*'s ſhare or capital in *the ſaid joint undertaking*; and that he ſhall be entitled to receive the profit or bear the loſs in proportion, &c. on the *joint concern*. Now a partnerſhip is a joint undertaking to ſhare in the profit and loſs; but ſuch was this undertaking: it was not only a joint concern in the ſhip, but alſo in the cargo. The fifteenth article alſo is material; which directs that, previous to the ſhip's ſailing, books ſhall be kept, in which each party intereſted ſhall be therein credited with the amount of his reſpective accounts, and that the books ſhall be ſigned by the parties, which ſhall be a voucher for aſcertaining the ſhares hereafter in profit and loſs. Now that clearly evinces what was the original intention of the parties. It is true that when the contract was made, the goods were not furniſhed on the joint credit

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of *Pearce* and the defendants, but of *Pearce* alone: but that is the caſe with dormant partners, and there the party furniſhing the goods may reſort to all thoſe who are entitled to ſhare in the profits. For though in ſuch caſe the dormant partners may not be known at the time of the contract, yet when that fact is aſcertained, the creditor has a right to avail himſelf of that evidence. The evidence of *Kaye* likewiſe is important; for he proved an acknowledgment by one of the defendants that they were liable to pay the whole debt for the ſhip and cargo. This ſhews that they conſidered themſelves as partners in the original tranſaction. And though ſubſequent evidence will not make a new contract, it may explain what that contract was. However, if this opinion be not well founded, the plaintiff would be entitled to recover on the bills of exchange.

Buller J. It is for the intereſt of all the parties that we ſhould now diſpoſe of the caſe before us, whatever may be done hereafter in the Court of Chancery. For if the grounds on which we proceed be diſtinctly known, it will put an end to further litigation. The only difference of opinion between my Lord Chief Juſtice and myſelf, ariſes on the laſt order of the

the Court of Chancery; but that order, I think, will be best explained hereafter by that Court. If this be considered purely as an action for goods sold and delivered, brought adversely in a court of law, and unconnected with the proceedings in the court of equity, I entirely agree with my Lord that the plaintiff cannot recover against these defendants the amount of *Pearce*'s share of the cargo. To make this case clear, suppose these defendants and *Pearce* had agreed to be concerned in a joint adventure, in which they were to be interested according to the proportion which each furnished, and that each were to bring in goods to the amount of 900*l.* and suppose the two defendants had paid for their shares, and *Pearce* had not, and that the defendants were also to be liable with *Pearce* for his share, in that case they would be liable for 900*l.* each more than *Pearce*, and would not be entitled according to the proportion which each brought in. In the argument an attempt was made to distinguish between the time of the contract and the time of the delivery: it is certainly true that if one partner order goods himself, without disclosing the names of the other partners, and the goods be afterwards delivered to them all, they are all liable, because the delivery and the sale

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are considered as forming one entire contract, and the delivery is supposed to be according to the sale. In such a case the one partner who buys the goods, does not contract for himself, but on account of the partnership. In that way of considering the question, upon the first order of the Court of Chancery, I think the plaintiff could not recover against these defendants for the amount of the goods sent in *August*, as *Pearce*'s share, in an action at common law for goods sold and delivered; because the goods were neither sold or delivered to the partnership. But that would be to dispose of the case according to the mere form of the action. But, according to my construction of the second order, we are not to consider the question in that light; for it is ordered that the plaintiff may give the bills in evidence, without prejudice to the form of the action; and therefore I think that this case is to be considered on the broad ground of substantial justice. This lets in the other question, whether, if the action had been brought on the bills, the plaintiff would not be entitled to recover? And that he would, I think no doubt can be entertained; for the bills of exchange were given for a good consideration. The defendants took

possession

poſſeſſion of the cargo, declared themſelves liable for the amount, and accepted bills expreſsly drawn for the value of the cargo; and therefore upon thoſe bills the plaintiff might unqueſtionably recover. Conſidering this as an action brought under the direction of the Court of Chancery, I think it is our duty to ſtate the law upon the whole of the caſe.

Groſe J. We muſt conſider this caſe, as the record ſtates it to be, as an action for goods ſold and delivered. And I cannot diſtinguiſh it from that put in argument, of ſeveral perſons agreeing to enter into partnerſhip, each bringing in a ſtipulated ſum of money, and each borrowing his proportion of different perſons; in which caſe it is impoſſible to ſay that the perſons advancing the money could maintain actions againſt all the partners for the ſeveral proportions lent to each. But if the queſtion were whether *any* action would lie, I have no doubt but that the plaintiff might recover againſt the defendants on the bills of exchange; which are written contracts, and were given for a valuable conſideration, the defendants at that time being in poſſeſſion of the whole of the cargo.

Lord

Lord *Kenyon*, Ch. J. then ſaid he hoped it would be remembered, when this caſe was returned into Chancery, that this Court were unanimouſly of opinion that on the whole juſtice of the caſe the plaintiff was entitled to recover.

CHAPTER XIV.

Of altering and putting an End to Partnership.

THE partnership contract being in its nature free and voluntary, may be altered or dissolved at the will of all the parties, and that even before the expiration of the term for which it was originally entered into: but in this case there must be a complete mutual consent. Such is the doctrine of our civil law[a]: and indeed the very tie or state of brotherhood which must necessarily exist among partners, being founded upon the reciprocal choice which the partners themselves make of one another in their respective hopes of profit, it naturally follows that a partnership lasts just as long as the partners persevere in their consent to continue it. But if either of the partners should see occasion to relinquish the partnership, whether it be on account of an unsuitableness of temper and disposition between the parties, or because one particular partner is averse to making speculations in trade, or engaging in some project-

[a] *Tamdiu societas durat quamdiu consensus partium integer perseverat.* D. l. 65. s. 3. ff. *pro socio.*

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ed ſcheme or enterprize, which, in the opinion and judgment of the reſt, carries with it a fair proſpect of ſucceſs; or, for any other unforeſeen reaſon, he may withdraw himſelf; provided he does not break off with ſome ſiniſter view, which is contrary to the rules of good fellowſhip, and the integrity of merchants, and tends to the prejudice of the other partners; or, provided he does not quit after ſome particular buſineſs is begun, or, at an unſeaſonable time, which might occaſion loſs, or damage to the partnerſhip.

In the firſt place, if a partner withdraws himſelf through ſome ſiniſter view or unfair deſign, he probably may diſengage his copartners from all engagements to him, but does not diſengage himſelf from his obligations to them; becauſe ſuch a fraudulent abandonment of the partnerſhip cannot in equity free the perſon, who ſo abandons, from his engagements. Thus alſo if he quits before the expiration of the time which the partnerſhip was to have laſted, abandoning a buſineſs which he was particularly charged with, and thereby occaſioning the loſs of ſome profit which otherwiſe might have accrued to the partnerſhip, he cannot in common juſtice be ſuffered to take advantage of ſuch his own

wrong,

wrong, but, he muſt, upon every principle of juſtice, be made anſwerable to the extent of ſuch loſſes. In like manner the partner who renounces the partnerſhip at any unſeaſonable time, not only does not free himſelf from his engagements to his copartners, but is anſwerable for all the loſſes and damages which ſuch his unſeaſonable renunciation may cauſe to the partnerſhip. And it is eſtabliſhed, upon ſound principle, that if a partner ſhould renounce his partnerſhip whilſt on a journey, or beyond ſea, or engaged in any buſineſs on the partnerſhip account; or if his quitting obliges the partners to ſell or diſpoſe of any merchandize to diſadvantage; he ſhall be bound to make good the loſſes and damages which his leaving the partnerſhip under theſe circumſtances ſhall occaſion. For a fraudulent and unſeaſonable renunciation, can never be permitted, whether the deed of copartnerſhip, or the bare partnerſhip contract had provided againſt it or not: and upon this plain principle, that it would be repugnant to that ſtrict fidelity, which has been already ſhewn to be eſſential to the formation and continuance of a partnerſhip, and is always underſtood to be comprehended in it.

PARTNERSHIP may be ſaid to be properly diſſolved by fairly deſtroying its conſtituent *unities*, thus is it diſſolved by the effluxion or expiration of that *time*, for which it was originally agreed between the parties to continue their paction for the purpoſe of carrying on the joint trade, with a view to their mutual benefit and reciprocal advantage.

Partnerſhip may alſo be diſſolved by the diſuniting their *poſſeſſion*, under a mutual agreement after a complete liquidation of all accounts which concern the joint property; but, if all parties remain ſolvent, this can only be done by conſent, for it would be contrary to equity, for one partner to renounce at an unſeaſonable time to the prejudice of the others. And as in partnerſhip concerns, there muſt be one and the ſame *intereſt* throughout, whether each individual partner contributes equally or not,[b] ſo likewiſe may that *intereſt* be diſunited by adjuſting and dividing the reſpective ſhares of the ſeveral partners according to agreement, and thereby diſſolving the partnerſhip. And, ſince the *title* of partners muſt be created by, or ariſe under one and the ſame agreement, ſo in like manner may it be deſtroyed.

[b] *Ante* p. 7.

Where partnership is contracted for a single dealing or transaction, or on account of some particular commerce, and an end is put to such concern by it's being completed, the partnership is dissolved of course.

It is customary in regular partnerships to insert a clause in the articles, by which the partners covenant to submit to arbitration any matter or thing which may become the subject of controversy or dispute between them. And altho' in such cases the arbitrators are usually judges of the parties' own choosing and proceed in a summary way; yet, if duly authorised, their award is considered *final*, consequently binding upon the parties unless there should appear just grounds, either at law, or in equity, to set it aside.c And it is a mode of dissolving partnership, very frequent amongst merchants and traders, and is considered a ready method of adjusting partnership claims. But in order to empower the arbitrators to proceed to the dissolving of a partnership, it would seem to be absolutely necessary for the parties, submitting to arbitration, to authorize the arbitrators to dissolve the partnership by inserting such their agree-

c Dyer 356. 1 Nelf. Abr. 124. 9 & 10 Will. 3. c. 15. ſ. 8.

ment

ment in their ſubmiſſion, or in the condition of the bond or promiſe. In like manner as it is requiſite, when partners agree to ſubmit all differences which may ariſe relating to their buſineſs, or to any covenant in the articles of co-partnerſhip to referrees whom they may chooſe, that ſuch their ſubmiſſion ſhould have in it a power given to the arbitrators to examine the parties, as well [redacted] witneſſes upon oath.

Thus it was held in the caſe of *Wellington* v. *Mackintoſh* d. Where one partner brought a bill againſt another, to diſcover and be relieved againſt frauds, &c. The defendant pleaded an agreement, that in caſe any difference ſhould ariſe between them, it was to be referred; and that the matters in the plaintiff's bill relate only to the partnerſhip, and yet have never been ſubmitted to arbitration, nor has he ever propoſed a reference, though the defendant offered, and was always ready to do it. Lord *Hardwicke* diſallowed the plea; for as it was a bill to diſcover and be relieved againſt frauds, the arbitrators could not examine on oath, which, by the agreement, they ſhould have had the power of doing.

d 2 Atk. 570.

This came on before the Lord Chancellor, on the defendant's plea, that the plaintiff and he, on the 15th of *November* 1728, executed articles of copartnerſhip, by which they covenanted to become joint traders as *Blackwall-Hall* factors, for eight years, and agreed in caſe any difference ſhould ariſe relating to their buſineſs, or of any covenant in the articles, it ſhould be referred; and avers, that all matters in the plaintiff's bill relate only to the partnerſhip, and that they have never been ſubmitted to arbitration, nor did the plaintiff ever propoſe a reference, or nominate any perſon to be an arbitrator, though the defendant offered, and was always ready to ſubmit all matters to arbitration; and demands judgment, if he ſhall further anſwer.

Lord *Chancellor*. The plea ought to be diſallowed in this caſe; and yet I would not have it underſtood, that ſuch an agreement might not be made in ſuch kind of articles, and pleaded; but ſuch a clauſe ſhould have in it a power given to the arbitrators to examine the parties, as well as witneſſes upon oath. But this bill is to diſcover and be relieved againſt frauds, impoſitions, and concealments, for which the arbitrators could not examine the parties on oath. Perſons might certainly have made ſuch an agreement as would have ouſ-

ted this court of juriſdiction; but the plea here goes both to the diſcovery and the relief; and if I was to allow the plea as to relief, I could not as to the diſcovery, and then the Court too muſt admit a diſcovery, in order to aſſiſt the arbitrators, which is not proper for the dignity of the Court to do.

After partners have diſſolved their copartnerſhip on a final balance being ſtruck and all accounts having been adjuſted between them, the parties are no longer liable for each other; and on ſuch diſſolution of a partnerſhip between *A. B.* and *C.* a power given to *A.* to receive all debts owing to, and pay thoſe owing from the late partnerſhip, does not authorize him to indorſe a bill of exchange in the name of the partnerſhip, though drawn by him in that name, and accepted by a debtor of the partnerſhip after the diſſolution: ſo that the indorſee cannot maintain an action on the bill againſt *A. B.* and *C.* as partners. Neither can ſuch indorſee maintain an action againſt them for money paid to the uſe of the partnerſhip, though in point of fact the money raiſed by diſcounting a note which he had given, (in diſcounting the bill,) be applied by *A.* to the payment of a debt due from the partnerſhip.

Thus it was held in the caſe of *Kilgour* v. *Finlyſon* and others,[e] which was an action brought by the indorſee againſt the oſtenſible indorſors, who alſo appeared to be the drawers of a bill of exchange. Money paid, money had and received, account ſtated. Verdict for the plaintiff. The circumſtances of this caſe were as follow. The plaintiff was a warehouſeman and factor, the defendants were alſo warehouſemen and factors in partnerſhip from *Midſummer* 1785, to the 28th of *July* 1787, when the partnerſhip was diſſolved, and notice of the diſſolution given in the *Gazette* as under.

"Notice is hereby given, that the copartnerſhip between *Thomas Finlyſon*, *Thomas Galbreath*, and *Henry William Harper*, of *Bow church-yard*, warehouſemen, under the firm of *Finlyſon*, *Galbreath* and *Harper*, and alſo at *Glaſgow* under the firm of *Henry William Harper* and Company, was by mutual conſent diſſolved this day; all demands upon the above firm will be paid by *Thomas Finlyſon* of *Bow church-yard*, who is impowered to receive and diſcharge all debts due to the ſaid copartnerſhip.

[e] H. Black. 155.

Witneſs

Witneſs our hands, this 28th day of *July*, 1787.

Thomas Finlyſon.
Thomas Galbreath.
Henry William Harper."

At the time of the above diſſolution, one *Scott* was indebted to the partnerſhip in 758 *l.* and the partnerſhip indebted to *Sterling Douglas*, and Co. in 890 *l.* On the 21ſt of *September* 1787, *Finlyſon* drew the bill in queſtion in the name of the late partnerſhip on *Scott*, payable on the 23d of *November* following, for 304 *l.* 2 *s.* which *Scott* accepted. On the 9th of *October*, *Finlyſon* indorſed it, in the name of the partnerſhip, to the plaintiff, who diſcounted it, by giving his own promiſſory note, for 304 *l.* 3 *s.* 6 *d.* payable on the 25th of *November*, (the difference of 1 *s.* 6 *d.* being on account of the note being due two days later than the bill). This note of the plaintiff's was indorſed by *Finlyſon* to *Sterling Douglas* and Co. who diſcounted it, and received the money they had advanced by ſo diſcounting the note, back again from *Finlyſon*, in part of payment of the debt owing to them from the partnerſhip. When the note became due, the plaintiff paid it to *Sterling Douglas* and Co. Two days before *Scott*'s bill became due,

Finlyſon took it up, and gave in lieu of it, another bill to the plaintiff, accepted by *Lee, Strachan* and Co. but did not take back *Scott*'s bill. Afterwards *Lee, Strachan* and Co's bill not being paid, and *Finlyſon* having become a bankrupt, the plaintiff brought this action againſt all the partners, on *Scott*'s bill, which remained in his hands, and obtained a verdict. A rule being granted to ſhew cauſe why this verdict ſhould not be ſet aſide, and a new trial granted, *Adair* and bond Serjts. ſhewed cauſe. They acknowledged that the action on the bill could not be ſupported, but contended that the plaintiff was intitled to retain his verdict, having paid money to the uſe of defendants, at the ſpecial inſtance and requeſt of a perſon authoriſed by them, to receive and pay their debts.

Le Blanc and *Lawrence* Serjts. for the rule argued, that it ought to have been ſhewn, that the money was actually paid, in diſcharge of a partnerſhip debt; if it were paid, when *Finlyſon* had no right to pledge the credit of the partnerſhip, it was not paid to the uſe of the partnerſhip. But admitting that it was paid for a partnerſhip debt, yet being paid without the knowledge and requeſt of the defendants it could not be ſufficient to raiſe an

aſſump-

aſſumpſit. *Finlyſon* had no authority to borrow money to pay their debt, or to contract for them without their conſent. This caſe muſt be conſidered as already decided by Lord *Kenyon* in the [f] King's Bench. *Adair* replied, that in the caſe cited, it was only holden that an action could not be maintained on the bill of exchange. The reaſon of which was, that the bill being negotiable, and going into the hands of perſons who might not know the conſideration for which it was given, muſt be binding when given, or not at all. The authority of the drawer, muſt be independant of any application of the money. But no ſuch inconvenience could ariſe from the action for money paid. It is admitted that *Finlyſon* paid the money of the plaintiff in diſcharge of a partnerſhip debt; he had full authority from the other defendants to receive and pay: he therefore applied to the plaintiff for his note, at their ſpecial inſtance and requeſt.

Lord *Loughborough*.—I was of opinion at the trial, that there was an equity in fa-

[f] In a caſe between the bank of *England* plaintiffs, and the ſame defendants, in which the circumſtances were the ſame as the preſent; there was a demurrer to the evidence which was not argued in Court, but Lord *Kenyon* at the trial gave it as his opinion, that the action on the bill could not be maintained.

vour of the plaintiff, the money ariſing from his note being *de facto* applied for the benefit of the partnerſhip, and the authoriry from the other partners giving him power to diſcharge their debts. But I am now convinced that I was miſtaken.

Conſider the nature of this tranſaction: *Finlyſon* applies to *Kilgour*, to diſcount the bill accepted by *Scott*, and in part of the diſcount takes a promiſſory note from him; *Kilgour*, before *Scott*'s bill became due, changes it with *Finlyſon* for another, accepted by *Lee, Strachan* and Co. returns that, and takes *Scott*'s bill back again. Now all this was carried on, without any indea of the former partners being bound by it. On the 10th of *October*, long before the plaintiff's note was due, the defendant applied to *Sterling Douglas* and Co. to diſcount it, who accordingly did diſcount it, but received the money back again in part of payment of their debt owing from the partnerſhip. When this note became due, the plaintiff paid it to *Sterling Douglas* and Co. but at that time no debt was owing to them from the partnerſhip; the payment therefore of the plaintiff, was not a payment to the uſe of the partnerſhip. Though the money raiſed by diſcounting his

note

note before it was due, was in fact paid in discharge of a partnership debt, yet he cannot follow the money through all the applications of it made by *Finlyson*.

Heath and *Wilson* justices, of the same opinion.

Rule absolute for a new trial.

CHAPTER XV.

By Bankruptcy.

PARTNERSHIP may alſo be diſſolved by bankruptcy, which needs no conſent, but is too frequently unavoidable, for trade cannot always be carried on with that degree of ſucceſs which is abſolutely neceſſary to ſupport it, however large the partnerſhip capital may be; neither can its ſucceſs be always ſecured by the moſt unwearied diligence and attention, ſince it is the ſame in commerce as in every other path of life, thoſe who purſue it, muſt neceſſarily be ſubject to the uncertain and fluctuating ſtate of humanity. But, independant of this, the young and inexperienced merchant, with the faireſt promiſes and expectations may, equally with the ſkilful and cunning trader commit an act of bankruptcy, and an act of bankruptcy by one partner is to many purpoſes a diſſolution of the partnerſhip, by virtue of the relation in the ſtatutes which avoids all the acts of a bankrupt from the day of the bankruptcy; and alſo from the neceſſity of the thing, all his property being veſted in the aſſignees, who cannot

not carry on a trade [a]. A commiſſion of bankrupt is to be conſidered as an *execution* [b] and not as an *action*; and where one partner commits an act of bankruptcy, and not the other, a commiſſion will go againſt him, for he owes the debt. Therefore it was decided in the caſe *ex parte Criſp* [c], that a debt due from a partnerſhip, is a legal debt to ſupport a ſeparate commiſſion. So alſo in the caſe of *Criſpe* v. *Perritt* [d], where it appeared that on the 1ſt of *February*, *Perritt* ſued out a commiſſion againſt *William Criſpe* of *Chelſea*, dealer in wines and chapman, and on the 2d of the ſame month, he was declared a bankrupt by the acting commiſſioners. On the 15th of the ſaid month, *Criſpe* preferred his petition to the Lord Chancellor, alledging, that he was not indebted to *Perritt* on his ſeparate account above 6*l.* but admitted he the ſaid *Criſpe*, together with *Edward Burnaby* and *James Barbut*, eſq. as co-partners of *Ranelagh houſe*, were all three jointly indebted to the ſaid *Perrit* for plaiſterers' work, but he did not know in what ſum; that he had not committed any act of bankruptcy, and therefore

[a] Cowp. 448, 471.
[b] 1 Vern. 153.
[c] 1 Atk. 134.
[d] C. P. 9th June 1743. Cooke's B. L. 20.

prayed

prayed that the ſaid commiſſion might be ſuperſeded.

On the hearing, the Lord Chancellor ordered, that upon *Criſpe*'s paying 100 *l.* into the bank, in the name of the accountant general, the major part of the commiſſioners ſhould make a proviſional aſſignment of the ſaid bankrupt's eſtate to an aſſignee to be appointed by them, and that the parties ſhould proceed to a trial at law in *London*, the then next *Eaſter* term, or at the Sittings next after, in the Court of Common Pleas, in an action of trover to be brought by the ſaid *Criſpe* againſt ſuch aſſignee for ſome part of the goods ſeized by virtue of the ſaid commiſſion, and that all further proceedings under the ſaid commiſſion, except the making of the ſaid aſſignment, ſhould be ſtayed until after the ſaid trial. The proviſional aſſignment was accordingly made to the defendant *Perritt*.

On the 9th of *June* 1743, in purſuance of the ſaid order, the action came on to be tried before Lord Chief Juſtice *Willes*, when it was proved that the ſaid *Criſpe* was a trader, and had committed an act of bankruptcy; and that he and his two partners, before the ſuing out

out the ſaid commiſſion, were jointly indebted to the petitioner *William Perritt* in 426 *l.* and it not being proved that the ſaid *Criſpe* owed the petitioners any ſeparate debt, Lord Chief Juſtice *Willes* doubted whether a ſeparate commiſſion againſt one partner for a joint debt due from him and his other partners could be regularly iſſued; and therefore directed a verdict to be found for the plaintiff, ſubject to the opinion of the Court of Common Pleas upon that point.

The caſe was argued in the following *Michaelmas* term, and a ſecond time in *Hilary*. On the argument of the caſe it was principally inſiſted by *Criſpe*'s counſel, that as an action at law did not lie, the commiſſion was irregular, and they defied the defendants to ſhew that ſuch a commiſſion was ever iſſued; but on a further argument the following precedents were produced.

"*John* and *Patrick Crawford*[e] were mer-
"chants and copartners, and became indebt-
"ed to one *Caruthers* in 1201 *l.* 16 *s.* 8 *d.*
"A commiſſion iſſued againſt *Patrick* only,
"on a debt due from him and partners.
"*Caruthers* petitioned Lord *Talbot*, ſtating

[e] Ex parte Caruthers. Cooke's B. L. 21.

" theſe facts, and that *Patrick* had obtained " his certificate, which was then lodged in " order to be paſſed by the Chancellor; and " for this ſuppoſed irregularity in the com- " miſſion, it was prayed the certificate might " not be allowed. His Lordſhip declared, " that where one partner commits an act of " bankruptcy, and the other not, a commiſ- " ſion will go againſt him, for he owes the " debt; and diſmiſſed the petition."

" *Henry Hewett* [f] and *William Ralphſon* were " merchants and partners; *Hewett* lived in " *London*, and *Ralphſon* at *Venice*, and became " juſtly indebted to *John Upton*: *Hewett* com- " mitted an act of bankruptcy: *Upton* ſtated " the facts ſpecially to Lord *Macclesfield*, " and obtained a commiſſion againſt *Hewett* " only."

The Chief Juſtice was of opinion that the defendant's counſel had fully anſwered the challenge, and declared theſe two caſes were in point, and that *a commiſſion was to be conſidered as an execution, and not as an action*; and after taking notice of the great inconvenience and prejudice it would be to trade, in caſe ſuch commiſſions were not allowed, he,

[f] Ex parte Upton. Cooke's B. L. 22.

by

by consent of all the other Judges, pronounced judgment, and declared that the commission was regularly issued, and that a verdict should be entered up for the defendant.

By the statute of *James* g, "A fraudulent "*conveyance* shall be an act of bankruptcy." *Other* acts that are fraudulent are not made acts of bankruptcy; but they are attended with the consequences of fraud, at *law*; which is, "that *fraud* renders *every* act *void* h."

So an assignment by deed of only a *share* of copartnership effects, to a *bona fide* creditor, will, notwithstanding, if done in contemplation of bankruptcy, itself become the very act i.

But, there is indeed a case k which appears to contradict this position; where *Norcotts*, who were goldsmiths, after shutting up their shop, being indebted to several persons much beyond what they were able to pay; in contemplation of bankruptcy, and to give a pre-

g 1 Jac. 1. c. 15. s. 2.

h 4 Burr. 2239.

i Cooke's B. L. 112.

k Small v. Oudley. 1 Burr. 480. 2 P. W. 427.

ference in payment to the plaintiff *Small*, (who, upon a preſſing occaſion, transferred to them 500 *l.* *South-Sea* ſtock, upon their engaging to transfer to him the like ſum in the *South-Sea* ſtock, in a week or ten days at fartheſt, and giving a note for that purpoſe, on the 29th of *September* 1720, made an aſſignment of their ſhare in a wine partnerſhip with *Oudley*, amounting to 300 *l.* carried on ſolely in his name, (in which they had two thirds, and *Oudley* one third) as a ſecurity for tranſferring 500 *l.* *South-Sea* ſtock, and reciting the truth of the caſe. They at the ſame time aſſigned two leaſehold eſtates to *Small*, for the ſame purpoſe. This aſſignment was made without the privity of the plaintiff *Small*. *Norcotts* never opened their ſhop again, but the very next day after making this aſſignment, went off.

The intereſt of the *Norcotts* in the wine trade was but 300 *l.* and *Oudley* had a right to carry on the trade till *Chriſtmas* 1723.

The bill (which was againſt *Oudley*, and againſt the aſſignee under a commiſſion iſſued againſt the *Norcotts*), was not brought by *Small*, till after that time: but an iſſue had been directed in another cauſe, to try "whether

ther the ſaid *Norcotts* were bankrupts at the time they executed an aſſignment to *Small* of a leaſe of certain houſes, on the ſaid 29th of *September* 1720."

The above facts were admitted by the anſwers. And Sir *Joſeph Jekyll*, Maſter of the Rolls, ſaid this aſſignment was good, and eſtabliſhed it.

But the authority of the caſe of *Small* v. *Oudley*, has been ſince much ſhaken by a deciſion in the Court of Common Pleas, expreſsly upon the ground of an aſſignment of *part* in contemplation of bankruptcy, being in itſelf fraudulent, and an act of bankruptcy [l].

So in an action of trover [m], where the queſtion turned upon the validity of a deed of aſſignment, dated the 23d of *October* 1778, from the bankrupt to his ſon, of part of his real and perſonal eſtate. The aſſignment was impeached upon two grounds; the one, that the bankrupt had committed an act of bankruptcy prior to the execution of the deed; the other, that the deed itſelf was an

[l] 3 Wilſ. 47. Cowp. 124.

[m] Round and another v. Hope Byde, London Sittings after Michaelmas term 1779.

act of bankruptcy. The petitioning creditor's debt became due, on bond, the 3d of *January* 1779. The 7th of *April* following, the commiſſion of bankruptcy iſſued. The bankrupt had carried on the buſineſs of a banker, in partnerſhip with *Archer* and another; which partnerſhip commenced the 1ſt of *June* 1776, and was diſſolved the 28th of *March* 1778. But the bankrupt appeared to continue in buſineſs for a length of time afterwards. The bankrupt and his family lived at his ſeat at *Ware Park*, in *Hertfordſhire*, having a houſe in town, in *White-Hart-Court*, *Gracechurch-ſtreet*, which he attended during the hours of banking buſineſs. *Green*, his ſervant, ſwore he was the only man who let people in and out at the town houſe. That in *Auguſt* and *September*, he denied ſeveral perſons. That he had ſometimes orders from his maſter to deny every body; at other times, ſuch as he knew to be creditors: to one creditor, *Chipps* in particular, by name. This witneſs was contradicted on the part of the defendant by another ſervant, who ſwore, that when any one came about buſineſs, he always called *Green*, who ſaid he had not his maſter's orders to deny. The evidence of *Green* was alſo attacked on the ſcore of its being new, the ſame not having been given before the commiſſioners,

miſſioners, but a different act of bankruptcy having been ſworn to, and *Green* having threatened, by way of revenge for a quarrel, that he would ruin the family, and that it would have been better for them if they had paid him his wages. The defendant called other witneſſes to prove the bankrupt's attendance at public meetings, and other places, during the months of *Auguſt*, *September* and *October*. The conſideration of the deed of aſſignment could not be impeached. The defendant, as it appeared, had from time to time entered into engagements for, or advanced money to the bankrupt, more than the value of the eſtates, and that he had taken poſſeſſion immediately on the execution of the deed. The bankrupt left *Ware Park* on the 26th of *October*, three days after the execution of the deed, and was not ſeen afterwards.

Lord *Manſfield*. A denial by order of a trader to a creditor, is not of itſelf an act of bankruptcy, but only evidence of it, and therefore to be explained. If a man is ſick, or as this caſe is, if a man lives three days in buſineſs, and the reſt of the week in the country, this explains a denial at any other houſe or lodging at any other part of the town, ſay-

ing, go to the ſhop. On the other hand, it is not neceſſary, in order to conſtitute a denial an act of bankruptcy, that the bankrupt ſhould have given orders to deny *any particular perſon* by name: if he gives orders to be denied to *every body*, it includes creditors, and is a keeping houſe, within the meaning of the act of Parliament. As to the firſt point, whether an act of bankruptcy had been committed, previous to the execution of the deed, it reſts chiefly on the evidence of *Green*. The ſecond queſtion will be material, if you determine for the defendant on the firſt. I take it to be clear law, that if in contemplation of bankruptcy, a man conveys to the faireſt creditor that ever exiſted, it is not a fraudulent deed as *between them*; but it tends to defeat the whole bankrupt laws, and as ſuch is held to be a fraud on the reſt of the creditors. It is equally clear, that though it be not a conveyance of the *whole* property, and that a part be omitted, yet if it be made in contemplation of bankruptcy, it is a preference, and as ſuch an act of bankruptcy. To apply this; the deed is fair as between the bankrupt and his ſon the defendant, but having been made three days before his abſconding, it is a *preference*.

Verdict for the plaintiff.

In

In the caſe of *Haman* and others aſſignees of *Fordyce* v. *Fiſher* n. Where a trader, in contemplation of abſconding, incloſed certain bills to *F.* a particular creditor, in diſcharge of his debt; ſaying he had the honour to ſhew him that preference which he conceived to be his due. Which was done without the privity of *F.* and followed by an act of bankruptcy before the notes could poſſibly be delivered. It was held by the Court that the *eſſential motive* being to give a *preference*, and the act itſelf *incomplete*, was clearly *void*, tho' no favor of a very meritorious creditor.

And in the caſe of *Hague* v. *Rolleſton* o. It ſeems to have been fully eſtabliſhed, what tranſaction of an abſconding partner in favour of a partnerſhip creditor, will be fraudulent and void, and prevent ſuch creditor's being intitled to any part of the partnerſhip effects. And alſo, how far the partnerſhip may be ſaid to be altered, or diſſolved by ſuch an act of bankruptcy.

This was a motion for a new trial, in an action of *Trover* brought to recover the value of ſeven bags of cochineal. It had

n Cowp. 117.
o 4 Burr. 2174.

been tried before Lord *Mansfield* at *Guildhall*; and a verdict found for the plaintiffs: but a point of law aroſe on the following facts.

Anne and *Iſaac Scott* were merchants and copartners. On the 27th of *March* 1767, *Iſaac* went out with intent to abſcond; and did not return till after a commiſſion of bankruptcy had iſſued againſt him, on the 30th, the defendant received a letter written by *Iſaac Scott*, dated "*Dover* 28th *March*," incloſing a bill of parcels, dated 23d *March*, of ſeven bags of cochineal, for 1645*l.* 14*s.* 6*d.* as if the defendant had purchaſed the ſame of the ſaid *Anne* and *Iſaac Scott*; and informing the defendant "that he (*Iſaac Scott*) was gone off," and "that he had depoſited the ſeven bags of cochineal at *George Street*'s warehouſe, in *Rolleſton*'s name and for his uſe;" though, in fact he had not purchaſed or agreed to purchaſe any ſuch goods of them: but the defendant imagined, it was intended to *ſecure him* in part of the debt due from the partnerſhip. On the 30th of *March*, the defendant went to the warehouſe of *George Street* in *Thames ſtreet*, which was a public warehouſe; where he found the ſeven bags of cochineal depoſited there in his name: which he ſold and diſpoſed of, and applied the

the money to his own uſe in part payment of the debt due from them to him. They had been depoſited there, with *Street*, on the 26th of *March*, for the defendant *Rolleſton*. On the 25th, *Iſaac Scott* told *Street*, "that they were for the defendant": and they were ſo booked at the warehouſe. But though the goods were ſent to the warehouſe *before Iſaac Scott*'s act of bankruptcy (viz. his abſconding and not returning;) yet the defendant did not then know that they were there: and he did not *declare his acceptance* of them, till *after* that time.

The plaintiffs were aſſignees in a joint commiſſion which afterwards, on the 12th of *April*, iſſued againſt both the *Scotts*, *Anne* and *Iſaac*. Sir *Fletcher Norton* and Mr. *Dunning* Solicitor General, inſiſted that the defendant was intitled to retain the *moiety* belonging to that partner, who did not become bankrupt till after *Rolleſton* had declared his acceptance of the cochineal; though there was afterwards, a joint commiſſion againſt both.

This act of *Iſaac* bound *both* partners. His ſubſequent bankruptcy could only affect his own ſhare in the partnerſhip eſtate: it could only

only affect the mother's. *Rolleſton* ſtands in the place of the mother: and before her bankruptcy, he was *joint partner* with the aſſignees of *Iſaac* in this cochineal; and had an *undivided moiety* in it. Beſides a trader may prefer one creditor to another, *before* any act of bankruptcy. And here is no fraud or colluſion in the defendant. Conſequently, the *joint* aſſignees againſt mother and ſon cannot maintain this action of *Trover* againſt *Rolleſton* for the *whole* of theſe goods. Mr. *Morton* and Mr *Wallace contra*, for the aſſignees under the joint commiſſion. The mother's moiety was bound by *Iſaac*'s bankruptcy. All the *joint* effects are bound by the bankruptcy of *either* partner, the meſſenger under the joint commiſſion of bankruptcy might have ſeized the *whole*, if they had remained in their warehouſe. Since a delivery as this was, under a private order of *Iſaac*, unknown to *Rolleſton*, and unknown to *Anne Scott*, was no ſale to *Rolleſton*. The goods were not appropriated to him, *till after Iſaac Scott*'s bankruptcy: and *after* his bankruptcy, he had no right to ſell. He could not, *after* that, bind the partnerſhip effects. *Rolleſton* took the goods *under the bill of parcels* which was ſent by *Iſaac* from *Dover*; at which time he was a bankrupt: and conſequently, *Anne Scott*'s

Scott's ſhare was liable to be ſeiſed under the commiſſion againſt *Iſaac*. On the other ſide it was urged in reply, that *Iſaac Scott* had, at *the time* of the act done, a right to diſpoſe of the goods: his act was the act of *both Iſaac* and *Anne*. His ſubſequent bankruptcy, only reſcinded *his* intereſt, but leaves *Anne*'s intereſt in *Rolleſton*. The aſſignees of *Iſaac*, and ſhe, were tenants in common of the goods. The Court muſt conſider it as if *Anne* had never become a bankrupt: for *Rolleſton* ſtood in her place. The act of *Iſaac*, when both partners were ſolvent, was, the act of *both* partners, and bound *Anne*'s ſhare as well as *Iſaac*'s. Therefore her ſubſequent bankruptcy ſignifies nothing: for her aſſignees can only ſtand in her place. *Street*'s warehouſe was a public warehouſe. And as ſoon as *Rolleſton* ſignified his aſſent to the contract, it was *perfected*. Indeed *Iſaac*'s ſhare was gone, by his prior bankruptcy: but as to *Anne*'s ſhare; the contract was perfected, and *Anne*'s ſhare was bound by it: and on the 30th of *March*, (which was prior to *Anne*'s bankruptcy) *Rolleſton* was intitled to her ſhare.

Lord *Mansfield*—"under a joint commiſſion, the commiſſioners aſſign the effects of

both.

both. On an application *ex parte Turner*, in *March* 1742, it was holden, that the joint commiſſion carries *all* the effects, both joint and ſeveral p. Conſider, here, the effect of booking the cochineal on the 26th *March*, in the name of *Rolleſton*; and whether it does not go to the whole. And the ſubſequent aſſent, if it does any thing, muſt go to the whole. The aſſent could not be good for part; and not good, for the other part. But the aſſent was to nothing at all. The depoſit was not completed, antecedent to the 30th of *March*. I was clear at the trial, that this aſſent could not be good for the whole; becauſe there was nothing to aſſent to: nor did *Rolleſton* in fact aſſent to any thing but the falſe bill of ſale ſent to him from *Dover*. And that bill of ſale was after the act of bankruptcy committed by *Iſaac Scott*. Therefore he could not then affect the partnerſhip; which was at an end, by the bankruptcy. And *Rolleſton*'s aſſent was to the falſe bill of ſale, ſent to him to make him a creditor upon a falſe foundation of a dealing upon ſpeculation."

Mr. Juſtice *Yates*—*Iſaac*'s contract muſt *bind the whole*, or *not operate at all*: it could

p 1 Atk. 97.

not

not be good for one part, and not for the other. His act was *not complete* upon the 26th *March*: it was *revocable* till *Rolleſton*'s aſſent; and he muſt aſſent to the *whole* contract, if he aſſented at all. All *Iſaac*'s power was gone, when he wrote from *Dover*. HIS ACT OF BANKRUPTCY DISSOLVED THE PARTNERSHIP.

The aſſignees of *Iſaac* could never be ſaid to be partners with *Anne* the other partner. The tranſaction is void, and ſeems a fraud: there is no account ſtated; a voluntary depoſit is made, to favour *Rolleſton*. Therefore *Iſaac*'s act was void, and had no effect on the moiety belonging to *Anne*.

Mr. Juſtice *Aſton* and Mr. Juſtice *Willes* were of the ſame opinion.

CHAPTER XVI.

By Death.

PARTNERSHIP is alſo diſſolved by the death of one of the partners: for, altho' partnerſhip may be entered into by the conſent of many, nevertheleſs it muſt be diſſolved by the death of one, unleſs ſpecial covenants were made to the contrary at the time of forming the partnerſhip [a]. And it would be unreaſonable if it were otherwiſe; for it might have been entirely owing to the induſtry or ſkill, the knowledge or the capital of that particular perſon that the partnerſhip contract was concluded; or theſe might have been the chief conſiderations which firſt induced the parties to treat about, or enter into ſuch an engagement.

And partnerſhip being diſſolved as above ſtated, by the death of one partner, his executor or adminiſtrator enters of courſe into all the rights of the perſon to whom he ſucceeds, yet ſuch executor or adminiſtrator of a partner not being a partner himſelf, has no right

[a] Juſt. Inſt. lib. 3. tit. 26.

to interfere with the partnerſhip concerns in the quality of a partner. But at the ſame time he is entitled to the profits which would have fallen to the ſhare of the deceaſed. So it has been determined, that the death of a partner, unleſs it be ſpecially provided againſt in the inſtrument conſtituting the copartnerſhip, *diſſolves it*, and it ſhall not ſubſiſt for the benefit of an executor: the reaſon of which is ſaid to be, that *primâ facie* this ſpecies of contract is entered into on the ground that both parties have ſkill in the buſineſs in which they engage, but an executor may have no ſkill therein: yet a temporary diſorder, as lunacy, intervening, if there be a proſpect of recovery, is no ground for diſſolving a partnerſhip.

Thus in the caſe of *Pearce* v. *Chamberlain*, at the *Rolls*, *October* 30th, 1750, which is reported as follows [b].

Articles between *Robert Plummer* and *Daniel Pearce* recited, that *Plummer* had carried on the trade of a brewer, at *Hoddeſdon*, and had employed *Pearce* as a ſervant and brewer; who having behaved himſelf faithfully, &c. and advancing a moiety of the value of

[b] 2 Vez. 33.

the

the effects, he took him into partnerſhip for nine years, if *Pearce* ſhould ſo long live; but if he lived to the end of the nine years, the partnerſhip ſhould continue for any further term not exceeding twenty-one years, as *Pearce* ſhould deſire, on giving notice to continue it. It was provided, that notwithſtanding the *death* of *Plummer*, it ſhould be carried on by his repreſentatives; and that if *Pearce* ſhould give that notice, he ſhould not have it in his option to pay off the repreſentatives of *Plummer*, and carry it on himſelf; but with them.

This bill was by the widow and repreſentative of *Pearce*, againſt the *repreſentatives* of *Plummer*, for an account, and for liberty to carry on the trade with the defendants.

For the defendants was cited *Godfrey* v. *Browning*, 17th *Mar.* 1742, where it was held, that one copartner could not appoint a repreſentative to carry on the trade after his deceaſe; otherwiſe it might fall to the lot of an infant or perſon not at all fit to carry it on; and *Baxter* v. *Burfield*, *B. R. Paſch.* 1746. where it was held, that a covenant to teach a boy his trade was reſcinded by the death of the maſter, on the ground that it was a bond to

ſerve

ſerve perſonally, and that he was not bound to ſerve an executor.

For *plaintiffs*. It might be ſo where it is a general partnerſhip; for then the death of one partner would determine it: but not ſo where a particular term has been agreed on: but if there was a caſe for that, it would not do here; becauſe the proviſion for the repreſentatives ought to be mutual; and ſhews, they did not guard againſt an infant's carrying it on. No caſe is cited to ſhew, that all partnerſhips muſt continue or conclude on the living or death of the principals. On the death of the maſter the boy cannot become apprentice by a courſe of repreſentation, as then it might be to the moſt ignorant perſon: but that is different from articles of copartnerſhip in a beneficial trade, wherein a right has been purchaſed for a period of years. In the caſe of *Huddleſton*, one party was a lunatick, who could not carry on the trade; yet Lord *Talbot* thought himſelf bound by the articles, and obliged the other to carry it on for the benefit of himſelf and the lunatick.

Maſter of the Rolls.— "Conſidering the whole frame and deſign of the articles, *Pearce* was only admitted in caſe of *Plummer*, and

for his ſkill in the trade; and after that end was defeated by his death, it could not be the intent that any *repreſentatives* of him ſhould have an opportunity to carry it on, as it might fall into ſuch hands as could not be of ſervice: and though it might come to the *repreſentatives* of one, and not of the other, that is, by expreſs proviſion of the parties, therefore on the articles, the plaintiff is not entitled to a decree to carry on the partnerſhip.

"But as a general queſtion, the conſequence with regard to trade weighs greatly with me. It would be of ill conſequence in general to ſay, that in articles of partnerſhip in trade, where no proviſion for the death of either is made, they might ſubſiſt for benefit of an *executor* who may not have ſkill therein. The *plaintiff* could be of no uſe in carrying on the partnerſhip. *Plummer* wanted one whoſe knowledge he could confide in. The *plaintiff*, the adminiſtratrix, is entitled to one third, the infant to the other two ſhares. Her inteſtate might be indebted, and the effects wanted to be diſtributed. It is improper therefore to ſuffer ſuch a conſtruction, unleſs the parties provide for it. I remember that caſe in *B. R.* It was an action againſt

againſt the ſurety in a bond conditioned for performance of the articles: the maſter, to whom the youth was bound, died; the executors thought they might make ſome benefit of his time, and their view was therefore not to have him perſonally their ſervant, and to inſtruct him farther in the trade, but to put that benefit of the infant's ſervice into their own pocket. The Court conſidering the inconveniencies attending apprentices, or trade in general, if infants were obliged to ſerve executors or adminiſtrators for remainder of the term, although not of the ſame trade with the infant, determined it for the defendant, that the action would not lie. I alſo remember *Huddleſton*'s caſe; and am pretty certain (though not very poſitive) that he was under a great dejection of mind, ſo that a commiſſion was applied for; but before that queſtion came before the Court, he had recovered himſelf, and was deſirous to carry on the partnerſhip. The Court ſaid, theſe were accidents that could not be provided for; but that was no reaſon, when he had brought all his ſubſtance into trade, the other partner ſhould ſay, that a temporary diſorder intervening ſhould deprive him during life from going on with the buſineſs, and that he ſhould put the whole benefit of the

partnership into his pocket, without accounting for it. So that the Court held, he had not forfeited the benefit under the partnership, but should, notwithstanding that accident, be considered as a partner. That case depended entirely on that circumstance; and there was a prospect of his recovery.

It may be also noticed in this place, that partnership is dissolved by forfeiture upon an attainder of felony or treason, which is, in contemplation of law, the civil death of the attainted partner, and has the same effect with regard to the partnership as *natural* death. For such person having no capacity to act, he is with regard to the partnership as if he were really dead; and his property being confiscated, his share is of necessity withdrawn.

And it is in general true that partnership may be altered or put an end to in all the several ways above set forth. But, although the foregoing will be found to hold good as general rules applicable to most cases, concerning the dissolution of partnership, and the manner in which the engagements of partners descend to their executors or administrators, yet there are exceptions, such as the partnerships of *farmers*, for instance, in which

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it is neceſſary to diſtinguiſh two kinds of engagements; one of the partners among themſelves, and the other of all the partners to the perſon of whom they take a farm. For ſince this laſt engagement deſcends to the executors or adminiſtrators of the partners [c], it is a neceſſary conſequence that being under a common engagement to others, they muſt be mutually engaged to one another. And if this tie does not make the perſonal repreſentatives and the ſurvivors copartners in like manner as thoſe are who have voluntarily choſen one another, yet it has this effect, that the executor, or adminiſtrator of a farmer being bound to perform the conditions of the leaſe to the leſſor, and having the right to manage the farm, or to cauſe it to be managed for his advantage, this right, and this engagement diſtinguiſhes his condition from that of the executors and adminiſtrators of partners, in other concerns; inaſmuch as he cannot be excluded from reaping his ſhare of the benefit of the farm, even although the partners had not begun to manage it before the death of the partner to whom he ſucceeds.

c Leaſes for years being chattels, go to the executor. Doctor and Stud. lib. 1. c. 7. and c. 24.

And this doctrine ſeems to be conſonant with the general rule reſpecting the right of SURVIVORSHIP among partners; for ſince every man has a natural right to the fruits of his own employment, ſo alſo is there a power veſted in every man to diſpoſe of ſuch fruits, whether engaged in a partnerſhip concern at the time of his death or not, it being agreeable to natural juſtice that the fruits of every man's trade ſhould deſcend to his repreſentatives, for the benefit of his children and family. Hence it is that our laws have eſtabliſhed the ſalutary rule that there ſhall be no benefit by ſurvivorſhip in copartnerſhip dealings [d]; and which ſeems alſo to be founded on the *Law Merchant*, for we find in *Littleton* [e], that "the wares, merchandizes, debts, or duties of joint merchants or partners, ſhall not ſurvive, but ſhall go to the executor of him that deceaſeth; and this is *per legem mercatoriam*, which is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accreſcendi inter mercatores pro beneficio commercii locum non habet.*" And this rule extends to all mer-

[d] 11 Co. 3. b. 2. Ro. Abr. 86. b. 2.
[e] Co. L. 182. a.

chants

chants and traders, though they do not go beyond sea [f].

And *per Coke*: There are four sorts of merchants, *viz.* adventurers, dormant, travelling, and resident; and neither of them shall take by survivorship [g].

Therefore it has been held that the executor of the deceased shall join with the surviving merchant for goods carried away in the life-time of the testator [h]. *Dub.* whether necessary? For the remedy survives, though the duty does not survive [i]. And though there is no survivorship between merchants, yet if there are two joint merchants, or two who are jointly possessed of goods in the way of trade, who casually lose them, and afterwards one of them dies, the survivor alone may, it seems, bring trover for them, for the action must necessarily survive, though the interest doth not, otherwise there would be a failure of justice; because the survivor and

[f] 2 Brownl. 99.

[g] 20 Vin. Abr. tit. Survivorship. D. 2 Brownl. 99. in *nota* there.

[h] Lutw. 1493.

[i] Show. 189. Salk. 444.

the executor of him who is dead cannot join in the action, for their rights are of several natures, and there must be several judgments; but it being held clearly, that if this was any plea, it must have been in abatement, for which reason the books say k, the principal point was not determined.

If where there are two joint traders, and one dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade. *Per* Lord Keeper *Harcourt*, *East*. 1715. *Brown* v. *Litton* l.

In this case the plaintiff's testator was captain of a ship, and being on his voyage beyond sea, had 800 dollars on board the ship, which he intended to invest in trade; the captain died, and the defendant (who was mate of the ship, becoming captain, took these 800 dollars, and investing them in trade, made great improvements thereof; but on his return to *England*, the executrix of the first captain brings a bill against him for an account.

k Carth. 170—1. Kemp & Andrews. 1 Show. 168. Comb. 474. 3 Lev. 290. S. C.

l 1 P. Will. 141. 10 Mod. 20. 2 Eq. Ca. Abr. 5. pl. 5. 722. pl. 2. S. P.

The

The defendant admitted the receipt of the money, and offered to repay the same with interest; whereas the plaintiff infisted on the profits produced in trade, and the several investments that had been made therewith.

Objection.—The defendant having traded with this money, it was at his risk and peril; and as, had it been loft in trade, the defendant muft have borne that lofs, fo it is reafonable, on the other hand, that the profit which has been made of it fhould belong to him; as where an executor puts out money without the decree of the Court, if this be loft, it is at his peril, and therefore he ought to have the intereft.

Lord Keeper faid, that he took the defendant, in this cafe, to be more like a truftee than an executor, and if fo, he ought clearly to account for the profits made of the money, that the primary intent in carrying abroad his money was, to invefl it in trade, and not to return with it home again; and therefore, the defendant having obferved the intent of the teftator in trading therewith, and having taken fuch a prudent care in the management of it, as (it might be prefumed he would have taken of his own money) his

Lordfhip

Lordſhip apprehended the defendant would not have been liable to anſwer for any loſs that might have happened; and compared it to the caſe of two joint traders, where, if one dies, and the ſurvivor carries on the trade after the death of the partner, the ſurvivor ſhall anſwer for the gain made by this trade.

The Court obſerved, that this being an iſland, all imaginable encouragement ought to be given to trade, and ſuch conſtruction was for the benefit of him who carried out this money with that intent; and there was no reaſon that his death ſhould ſo far injure his family and relations, as to deprive them of the benefit which might accrue from it in the way of trade. But that, to recompence the defendant for his care in trading with it, the Maſter ſhould ſettle a proper ſalary for the pains and trouble he had been at in the management thereof; and in the mean time coſts to be reſerved [m].

The diſtinction made between joint-tenants and co-partners in reſpect of ſurvivorſhip by the laws of *England* is, that ſurvivorſhip re-

[m] Reg. Lib. A. 1710. fol. 660.

gularly

gularly takes place in jointenancy, unleſs there is a ſpecial agreement to the contrary, but not in a partnerſhip amongſt merchants [n]. And Courts of Law will take notice of the *lex mercatoria* without its being ſpecially pleaded with reſpect to this general cuſtom.

For in the caſe of *Bellaſis* v. *Heſter* [o], *Powell* Juſtice ſaid, "That the Court would take notice of the *lex mercatoria*, as that there is no ſurvivorſhip."

And in articles of co-partnerſhip between merchants it is not neceſſary to provide againſt ſurvivorſhip.

Thus in the caſe of *Jeffereys* v. *Small* [p], *Lord Keeper* ſaid, "The cuſtom of merchants is extended to all traders, to exclude ſurvivorſhip."

And in a cauſe for an account of a co-partnerſhip, *both* partners being dead, a receiver ſhall be appointed [q].

[n] 1 Inſt. 182. a.

[o] 1 Ld. Raym. 281.

[p] 1 Vern. 217.

[q] 2 Brown. 272.

APPENDIX.

[No. I.]

Articles of Copartnership,

For carrying on a Joint Trade.

(Common Form.)

ARTICLES of agreement indented, &c. between *A. B.* of —— of the one part, and *C. D.* of —— of the other part.

First, The said *A. B.* and *C. D.* HAVE joined, and by these presents DO join themselves to be copartners together in the art or trade of —— and all things thereto belonging; and also in buying, selling, vending and retailing all sorts of wares, goods and commodities belonging to the said trade of —— which said copartnership is to continue from —— for and during, and unto the full end and term of —— from thence next ensuing, and fully to be compleat and ended. AND to that end and purpose, he the said *A. B.* hath, the day of the date of these presents, delivered in as stock the sum of —— and the said *C. D.* the sum of —— to be used, laid out and employed in common between them, for the management of the said trade of —— to their mutual benefit and advantage. AND it is agreed between the said parties to these presents, and the said copartners each for himself respectively, and for his own particular part, and for his executors and administrators, DOTH severally and not jointly covenant, promise and agree, to and with the other partner, his executors and administrators, by these presents, in manner and form following (that is to say) That they the said copartners shall not nor will at any time hereafter use, exercise or follow the trade of —— aforesaid, or any other trade whatsoever,

Parties join in copartnership for years.

Each hath delivered in money, as stock, to be laid out, &c.

Not to use their trade for private benefit,

ſoever, during the ſaid term, to their private benefit or advantage, but ſhall and will from time to time, and at all times during the ſaid term (if they ſhall ſo long live) do their and each of their beſt endeavours in and by all means poſſible to the utmoſt of their ſkill, power and cunning, for their joint intereſt, profit, benefit and advantage, and truly employ, buy, ſell and merchandize with the ſtock aforeſaid, and the increaſe thereof, in the trade of —— aforeſaid, without any ſiniſter intentions or fraudulent endeavours whatſoever. AND ALSO that they the ſaid copartners ſhall and will from time to time, and at all times hereafter during the ſaid term, pay, bear and diſcharge equally between them the rent of the ſhop which they the ſaid copartners ſhall rent or hire for the joint exerciſing or managing the trade aforeſaid. AND that all ſuch gain, profit and increaſe that ſhall come, grow or ariſe for or by reaſon of the ſaid trade, and joint occupying as aforeſaid, ſhall be from time to time during the ſaid term equally and proportionably divided between them the ſaid copartners, ſhare and ſhare alike. AND ALSO that all ſuch loſs as ſhall happen to the ſaid joint trade by bad debts, ill commodities, or otherwiſe, without fraud or covin, ſhall be paid and borne equally and proportionably between them. AND FURTHER it is agreed by and between the ſaid copartners, parties to theſe preſents, that there ſhall be had and kept from time to time, and at all times during the ſaid term, and joint occupying and copartnerſhip together as aforeſaid, perfect, juſt and true books of account, wherein each of the ſaid copartners ſhall duly enter and ſet down, as well all money by them received, paid, expended and laid out in and about the management of the ſaid trade, as alſo all wares, goods, commodities and merchandizes by them or either of them bought and ſold, by reaſon, or means, or upon account of the ſaid copartnerſhip, and all other matters and things whatſoever, to the ſaid joint trade, and the management thereof, in any wiſe belonging or appertaining;

but for their joint intereſt.

Shop rent.

Gain.

Loſſes.

Books of account.

taining; which ſaid books ſhall be uſed in common between the ſaid copartners, ſo that either of them may have acceſs thereto without any interruption of the other. AND ALSO that they, the ſaid copartners, once in three months or oftener if need ſhall require, upon the reaſonable requeſt of one of them, ſhall make, yield and render each to the other, or to the executors of each other, a true, juſt and perfect account of all profits and increaſe by them or either of them made; and of all loſſes by them or either of them ſuſtained; and alſo of all payments, receipts, diſburſements, and all other things whatſoever by them made, received, diſburſed, acted, done, or ſuffered in their ſaid co-partnerſhip and joint-occupying as aforeſaid, and the ſame account ſo made, ſhall and will clear, adjuſt, pay and deliver each unto the other at the time of making ſuch account their equal ſhares of the profits ſo made as aforeſaid. AND at the end of the term of —— or other ſooner determination of theſe preſents (be it by the death of one of the ſaid co-partners or otherwiſe), they the ſaid co-partners each to the other, or in caſe of the death of either of them the ſurviving party to the executors or adminiſtrators of the party deceaſed, ſhall and will make a true, juſt and final account of all things as aforeſaid, and divide the profits aforeſaid, and in all things well and truly adjuſt the ſame, and that they alſo upon the making of ſuch a final account and all and every the ſtock and ſtocks as well as the gains and increaſe thereof which ſhall appear to be remaining, whether conſiſting of money, wares, debts, &c. ſhall be equally divided between them the ſaid co-partners, their executors or adminiſtrators, ſhare and ſhare alike. *In witneſs, &c.*

Settling accounts during the partnerſhip,

and at the end thereof diviſion of ſtock.

[No. 2.]

Articles of Co-partnership

Between two Bankers, where one fixed in Business admits the other to be Partner, and to have one fourth of the Profits.

A. B. possessed of a house and shop exercises the trade,

ARTICLES of Agreement indented, &c. between *A. B.* of *L.* Banker, of the one Part, and *C. D.* of *M.* Goldsmith, of the other Part.

WHEREAS the said *A. B.* is possessed of a house and shop situate in —— for several years yet to come, AND WHEREAS the said *A. B.* hath for several years now last past used and exercised, and doth now use and exercise in the said shop the trade of a goldsmith or banker, in selling plate, receiving and keeping several persons' money and giving out bills and notes for the same, and issuing and paying thereof to the said persons or their orders. AND

is desirous to ease himself and is willing to accept C. D. a partner.

the said *A. B.* having a desire as well to ease himself of the trouble of the attendance and management of the whole business of the said trade, as for the affection he hath and beareth to the said *C. D.* he the said *A. B.* is willing to accept and take the said *C. D.* to be partner with him in the said trade as to such part of the benefit and advantage thereof, and on such terms and conditions as are herein after agreed for the furnishing, managing and carrying on the said intended joint trade. AND for that purpose it is

Stock.

agreed that a joint stock of 6000*l.* in money shall be advanced and made up between them the said *A. B.* and *C. D.* (to wit) by the said *A. B.* three-fourth parts thereof, and by the said *C. D.* the other one fourth part thereof, of which said stock the said *A. B.* hath accordingly advanced and paid the full sum of 4500*l.* and the said *C. D.* the sum of 1500*l.* being the sum of 6000*l.* agreed on to carry on the said trade.

trade. AND in regard ſome diſputes may ariſe relating to the preſent debts and credits of the ſaid trade now managed by the ſaid *A. B.* it is agreed that the ſchedule hereunto annexed (intitled the debts and credits of the within-named *A. B.*) ſhall be accepted by the ſaid parties, and the neat balance of the ſaid account in the ſchedule mentioned ſhall be taken as part of the money to be advanced by the ſaid *A. B.* NOW THESE PRESENTS WITNESS that the ſaid *A. B.* for the cauſe aforeſaid, and for the truſt and confidence he hath and repoſeth in the ſaid *C. D.* HATH admitted and accepted, and by theſe preſents DOTH admit and accept, the ſaid *C. D.* to be partner with him in the trade aforeſaid, and the ſaid *A. B.* and *C. D.* are to become partners in the trade of a goldſmith or banker, to be uſed, exerciſed and carried on in the ſhop aforeſaid, on the joint ſtock aforeſaid, for the term of ſeven years, to commence and begin from the —— day of —— now laſt paſt before the date of theſe preſents. Nevertheleſs under the limitations, and according to, and upon the covenants, grants, clauſes, proviſoes, conditions and agreements herein-after in theſe preſents mentioned, expreſſed and declared. AND IT IS AGREED by and between the ſaid parties to theſe preſents, that the ſaid *A. B.* his executors, adminiſtrators and aſſigns, ſhall during the ſaid copartnerſhip, be paid and allowed out of the joint ſtock of the ſaid trade, in conſideration of and for the uſe of the ſaid ſhop the yearly rent of 10*l.* to be deducted and paid out of the ſaid joint ſtock by even and equal portions. AND ALSO the ſaid *A. B.* is to be allowed and paid out of the ſaid joint ſtock one fourth part of all journeymens' wages, and one fourth part of their diet and lodging. AND IT IS AGREED by and between the ſaid parties to theſe preſents, that the ſaid *A. B.* his executors, adminiſtrators and aſſigns ſhall have, receive and enjoy to his and their own proper uſe and uſes three full one fourth parts (the whole into four equal parts to be divided) of all the clear and

A. B.'s debts and credits.

A. B. admits C. D. a partner.

Agreement as to rent.

Servants' wages.

Diet and lodging.

Shares in the profits.

net profits, produce, benefit and advantage which from time to time during the said co-partnership shall arise, accrue, or be made or gotten by the management of the said joint trade, or the increase or improvement of the joint stock thereof, and that the said *C. D.* his executors, administrators and assigns, shall have, receive, and enjoy to his and their own proper use and uses, one full fourth part of the said produce, profit, benefit and advantage which from time to time during the continuance of the said co-partnership shall arise, accrue, or be made or gotten by the management of the said joint trade, or the increase or improvement of the said joint stock thereof. AND the said *C. D.* for himself, his executors and administrators, doth covenant, promise and grant, to and with the said *A. B.* his executors and administrators by these presents, that he the said *C. D.* shall and will from time to time, during the said co-partnership, use his utmost endeavours, care and diligence to manage the affairs of the said joint trade, and to increase and improve the said joint stock thereof to the best advantage. AND IT IS AGREED by and between the said parties to these presents, that all such monies belonging to the said joint stock and trade, and the increase and produce of the said joint stock as shall be received by either of the said parties to these presents, during the continuance of the said partnership, shall from time to time be paid and brought into the said joint stock. AND that all taxes, parish duties, payments, impositions, used in carrying on the said trade, and all debts, losses by bad debts, and charges whatsoever, which shall arise or be contracted, made or owing, or grown and become due, to be paid by reason of the said joint trade or the management thereof, shall be, during the said partnership, borne, paid, sustained, and defrayed out of the said joint stock, and be deducted and satisfied before any dividend according to the said parties interest therein, (that is to say) three parts thereof by the said *A. B.* and one fourth thereof by the said *C. D.*

Covenant that he who is taken into co-partnership shall do his endeavours in managing the joint trade.

Agreement as to the joint stock and produce.

Taxes, payments, servants' wages, debts, losses, &c.

C. D. AND FURTHER that neither of the ſaid parties, without the conſent of the other of them firſt had in writing, ſhall become bound or bail for any perſon whatſoever during the ſaid partnerſhip. AND FURTHER that the ſaid *C. D.* ſhall not, without the conſent of the ſaid *A. B.* firſt had and obtained in writing, lend to any perſon any ſum exceeding 50*l.* AND IT IS FURTHER AGREED by and between the parties to theſe preſents, that all and every the books of account touching the ſaid joint trade ſhall be kept in the ſaid ſhop, and that once in every year (to wit) ſome time in the month of —— during the continuance of the ſaid partnerſhip, a general, full and perfect account ſhall be ſtated, adjuſted, and made up between the ſaid parties to theſe preſents, of all matters and things touching the ſaid partnerſhip, and after the ſame ſhall be made up, adjuſted, and fairly entered in books for that purpoſe and ſigned by the ſaid parties, duplicates ſhall be then alſo made and ſigned by the ſaid parties, and one part thereof delivered to each of them, which duplicate ſhall contain a full account of the ſtock, debts and credits of the ſaid partnerſhip. AND IT IS AGREED that after the ſaid annual account is made up, each of the ſaid parties ſhall and may deduct and take out of the profits, neat produce, and increaſe of the ſaid trade, to and for his own particular uſe, ſuch ſum and ſums of money as ſhall be mutually agreed upon by and between the ſaid parties to theſe preſents. AND it is hereby further agreed that no advantage of ſurvivorſhip ſhall be taken by the ſaid parties, but that on the death of either of them, the executors or adminiſtrators of the party ſo dying, giving ſecurity to the ſurvivor to indemnify him, ſhall and may receive the ſhare or intereſt in the ſaid joint ſtock of the party ſo dying. PROVIDED ALWAYS and it is hereby declared by and between, *&c.* that the ſaid *C. D.* ſhall not at any time hereafter during the continuance of this preſent partnerſhip, or by virtue thereof, have any power, liberty or authority to (nor ſhall

Being bound in bail for other perſons.

Lending money.

Account books and accounts.

Money deducted for the particular uſe of each party.

Survivorſhip.

Proviſo as to turning away ſervants.

in any wise) turn away any journeyman or servant employed, or hereafter to be employed, in the joint trade, without the consent of the said *A. B.* in writing first had and obtained. PROVIDED FURTHER, and it is covenanted and agreed to by the said *C. D.* that if the said *A. B.* shall be desirous and minded to determine and dissolve this present partnership, (which is however in all events to continue for the space of two years from the —— day of —— aforesaid) that then, and in such case, it shall and may be lawful to and for the said *A. B.* at the end of the said two years, and upon his giving first a year's notice in writing to the said *C. D.* to determine and make void this present partnership; and that on that day 12 months after such notice given to the said *C. D.* the said partnership and joint trade shall cease, determine and be utterly void, and of no effect, any thing, &c. AND LASTLY, it is hereby declared and agreed by and between the said parties to these presents, that at the end of the said partnership (either by effluxion of time, or by such notice given to the said *C. D.* by the said *A. B.* pursuant to the proviso above written) a just and fair account shall be taken and made up between the said parties of the said joint stock of 6000 *l.* and the produce, profits and proceeds thereof, and of all other matters and things relating to the said joint stock and trade, and of all losses, bad debts, charges and deductions; and the neat and clear produce of the said joint stock and trade shall be divided into four equal parts or shares, 3-4th parts whereof shall belong to, be had, received and disposed of by the said *A. B.* and the remainder 1-4th part by the said *C. D.* AND ALSO, that the said parties shall then give each other such releases, and enter into such bonds for each other's mutual indemnity, and take such measures by letter of attorney to get in the debts standing out, and execute such other deeds and other agreements, and do such other acts as are usual and reasonable between partners, on the determination of a copartnership. IN WITNESS, &c.

Agreement as to ending partnership.

Proviso to end the partnership on notice.

[No. 3.]

Articles of Copartnership

Between three Sisters, to carry on the Business of Milliners.

THIS Indenture tripartite, made, &c. between *E. C.* of——of the 1st part, *M. C.* of——of the 2d part, and *S. C.* of——of the 3d part, WITNESSETH that the said *E. C. M. C.* and *S. C.* for the mutual love and affection they have and bear to each other, and having had experience of each others care and fidelity, and in confidence thereof for the future, and the better to improve their respective estates, HAVE agreed, and by these presents DO agree to become copartners in the art or business of milliners, for the term of 7 years, to commence from——(if the said parties shall so long live,) with the joint stock of 600*l.* to be raised and brought in manner following, and to be managed and carried on for their mutual benefit and advantage, at their own dwelling house in——. AND for that end and purpose, IT IS MUTUALLY COVENANTED, consented to and agreed by and between the said parties to these presents, that the several household goods, wares and merchandizes mentioned and comprised in the inventory, &c. shall be valued and reckoned at the said sum of 600*l.* and shall be by them allowed, deemed and taken as so much money, being the whole money intended to be the said joint stock. AND that they the said *E. C. M. C.* and *S. C.* shall and will be just, true and faithful each to the other, in all buyings, sellings, accounts, reckonings and dealings together, concerning the said copartnership, and shall and will mutually endeavour by all JUST care and diligence, to advance and promote the said joint trade and stock, with-

That for the mutual love and confidence.

Agree to be copartners.

Stock.

Covenant that household goods and wares be valued at.

To be just and true to each other.

Pay rent.

without fraud or colluſion. AND they ſhall equally bear and allow each an equal ſhare and proportion, for or in reſpect of the rent of the houſe they now dwell in, and of ſuch yearly rent of any other houſe or lodging, which they ſhall hereafter think fit to take or rent during the ſaid copartnerſhip; and of all charges of houſekeeping, ſervants wages, and pariſh rates and duties, and of all taxes and aſſeſſments whatſoever, which ſhall be rated or aſſeſſed on them the ſaid *E. C. M. C.* and *S. C.* or any or either of them in reſpect of their ſaid houſe or lodgings, trade or employment, during their ſaid copartnerſhip. AND ALSO of all loſſes, coſts and expences which ſhall at any time happen, or be occaſioned by or by means or in reſpect of the ſaid joint trade during the ſaid copartnerſhip, (ſubject nevertheleſs to the proviſos and agreements herein after mentioned,) without each others neglect or wilful default, which ſhall be from time to time paid and ſuſtained out of the ſaid joint-ſtock, or the proceeds ariſing thereby. AND that during the ſaid copartnerſhip, one or more book or books of account ſhall be kept, at the place where the ſaid trade or employment ſhall be carried on and managed, wherein entries ſhall be made of all ſuch ready monies or goods as ſhall be brought into or employed in the ſaid joint ſtock, and of all goods by them bought or ſold on account of the ſaid joint trade, and of all debts by them contracted in relation to the ſaid copartnerſhip, and an account ſhall be likewiſe taken in writing of all ready money by them received in their ſaid way of trade, and of all goods by them ſold upon credit; and entries ſhall be made of parties' names, to whom ſuch goods were ſold, and at what rate or price, and alſo of what ſum or ſums of money ſhall be from time to time taken out, by the ſaid copartners, or either of them, or their order, for defraying the expences of their family and ſervants, or in any otherwiſe relating to the ſaid copartnerſhip; which ſaid books the ſaid copartners, and their reſpective executors and adminiſtrators ſhall freely,

Charges of houſekeeping, ſervants wages and taxes equally between them.

And bear loſſes and expences.

Books of accounts to be kept.

ly, and at all convenient times, as well during the continuance as after the expiration of the said copartnership, have liberty to resort to, inspect and peruse when and as often as occasion shall require. And it is further agreed by and between the said parties to these presents that the said copartners shall upon such occasions have liberty to transcribe a copy of all, or any part of the account therein mentioned, without the let, hindrance or denial of each other. And that all bonds, bills, notes, specialties, or other securities taken by the said copartners, or either of them, for any debt or debts contracted on account of the said joint trade or employment, shall be made and taken in the names of all and every the said copartners, and for their joint use and benefit; and be by them deposited in some convenient place, where the said trade shall be carried on and managed, to which either of the said copartners shall have a liberty to resort as occasion shall require. And that it shall and may be lawful, to and for the said *E. C. M. C.* and *S. C.* or either of them, with the approbation of each other of them, and not otherwise, to have and take in turns, one or more apprentice or apprentices, or covenant servant, to be employed in and about the business of the said joint trade, taking good security for the fidelity of such apprentice or apprentices, or covenant servant, and for their good demeanour during their continuance in the said employment, so as such apprentice, apprentices or covenant servants shall be at the command of all and every of the said copartners. And that all monies to be had and taken with any such apprentice or apprentices, or covenant servant, shall be brought into the said joint stock, and employed during the continuance in the said copartnership, for the mutual benefit of the said copartners, and then to be accounted for and answered to the party to whom such apprentice shall be bound. And if such apprentice or covenant servant shall imbezil, waste, purloin and spoil any of the said goods belonging to the said copart-

And copies thereof may be made.

Bonds notes, &c. to be taken in all their names.

Of taking apprentices and servants.

Monies taken with apprentices, &c.

Imbezilment by apprentices.

nerſhip, and the ſecurity taken for the fidelity of ſuch apprentice or ſervant, ſhall not be reſponſible to anſwer the damages or loſs which ſhall happen thereby, that then ſuch loſs or damage ſhall be ſuſtained and borne out of the ſaid joint ſtock, or the proceeds ariſing thereby. AND it is further agreed by and between the ſaid parties to theſe preſents, that neither of them the ſaid *E. C. M. C.* and *S. C.* ſhall not at any time or times hereafter, during the continuance of the ſaid copartnerſhip, ſell or deliver out upon truſt, and without ready money, any of the goods employed in the ſaid joint trade, to the value of 5*l.* or upwards, or truſt out, or lend any money out of the ſaid ſtock above the value aforeſaid, to any perſon or perſons whatſoever, without the conſent of each other, nor without each others conſent, releaſe or diſcharge any debt or ſum of money, which ſhall be due or owing to them on their joint account, or any part thereof, or any ſecurity given for the ſame; but only ſuch, and ſo much as ſhall be actually received, and brought into the joint ſtock; nor compound or agree to accept part for the whole of any debt or ſum of money to them jointly, owing or payable, without the conſent and approbation of the other of them thereto, in writing firſt had and obtained. AND that neither of the ſaid copartners ſhall at any time during the continuance of this copartnerſhip, and before a final partition made between them, become bound, bail or ſurety for, with, or to any perſon or perſons whatſoever, either by bond or bill, promiſe or otherwiſe, without the privity or conſent of the other of them thereto in writing firſt had and obtained. AND it is further agreed by and between them the ſaid *E. C. M. C.* and *S. C.* that they ſhall once in every year yearly, during the ſaid copartnerſhip, at the feaſt of —— or within twenty days then next enſuing come to a fair, plain and perfect account and reckoning with each other, of, for and concerning all matters relating to the ſaid copartnerſhip, [*or ſay*, all their buyings, ſellings,

One not to truſt to above 5*l.* without the others conſent.

Of releaſing and compounding for debts.

Of being ſurety or bail.

To account once a year.

ſellings, tradings and dealings for, upon, or by reaſon of their joint account, and relating to their ſaid copartnerſhip, and of every ſuch ſtocks, ready money and things as concern, or then ſhall be employed in and about the ſame, and of the gains, profits and increaſe thereof; and alſo of the charge, damage, loſſes, and expences happening or arruing thereby, and likewiſe of all debts owing to and by the ſaid copartners, for, upon, or in reſpect of their ſaid joint trade and dealing; to the intent it may appear how and in what ſtate and condition they then ſtand in reference to their ſaid copartnerſhip and joint ſtock; and that upon the finiſhing and perfecting of every ſuch account, the ſame ſhall be fairly written and entered in three ſeveral books for that purpoſe to be provided, all three of which ſaid books ſhall be ſubſcribed by the ſaid *E. C. M. C.* and *S. C.* and one of them ſo ſubſcribed ſhall remain with the ſaid *E. C.* and one of them ſo ſubſcribed ſhall remain with the ſaid *M. C.* and the other of them ſo ſubſcribed ſhall remain with the ſaid *S. C.* which ſaid accounts ſo paſſed and ſubſcribed ſhall not be called in queſtion or controverted, unleſs ſome ſpecial error or miſtake ſhall evidently and plainly appear to have therein eſcaped notice, and that the ſame errors ſhall be certified in the life-time of all the ſaid copartners, and not otherwiſe. And alſo that within forty days next, after the expiration of the ſaid copartnerſhip, a true and general account ſhall be made of all their dealings on account of their joint ſtock, and a juſt and equal partition ſhall be thereof made. Provided always, and it is expreſsly agreed by and between the ſaid parties to theſe preſents, that if either of them the ſaid *E. C. M. C.* and *S. C.* ſhall happen to die before the expiration of the ſaid term of ſeven years, or ſooner determination of this preſent copartnerſhip, and before a final account or partition ſhall be paſſed and made between them, of all matters and things relating to the ſaid copartnerſhip, no benefit or advantage of ſurvivorſhip ſhall accrue unto, or be taken by the other of them, in any wiſe whatſoever; but

And to account within 40 days, &c.

Proviſo that if one of the copartners die, no ſurvivorſhip ſhall accrue, but an account ſhall be taken by indifferent perſons, and the ſurvivors ſhall either take the

whole ſtock at an appraiſement, paying the executors or adminiſtrators of the deceaſed, one third of the value, or permit them to diſpoſe of one third of the ſtock.

but in ſuch caſe a true and juſt account ſhall be taken by three indifferent perſons, one to be choſen by each of the ſurvivors of the ſaid copartners, and the other by the executors or adminiſtrators of the party ſo dying; and the ſurvivors of them the ſaid *E. C. M. C.* and *S. C.* ſhall have their election, either to take the whole ſtock and produce thereof, at the rates the ſame ſhall be appraiſed at, paying one third part of the value, at which the ſame ſhall be appraiſed, unto the executors or adminiſtrators of the party ſo dying within ſix months after ſuch copartner's death, or permit and ſuffer the executor or adminiſtrator of the party ſo dying to diſpoſe of the ſaid one third part of the ſaid ſtock and produce thereof at their own will and pleaſure.

Covenant for performance of covenants.

AND the ſaid *E. C.* for herſelf, her executors and adminiſtrators, doth covenant, promiſe and agree to and with the ſaid *M. C.* and *S. C.* their executors and adminiſtrators by theſe preſents, that ſhe the ſaid *E. C.* her executors and adminiſtrators ſhall and will, well and truly perform and keep, all and ſingular the covenants, proviſoes and agreements herein before mentioned, on her and their parts and behalfs to be performed and kept, according to the intent and true meaning of theſe preſents. AND, &c. [*the like covenants from M. C. to E. C. and S. C. and from S. C. to E. C. and M. C.*]

Any one of the copartners may diſſolve the copartnerſhip on giving 6 months notice, and paying 50l.

AND it is mutually agreed by and between the ſaid parties, that in caſe either of them, the ſaid *E. C. M. C.* and *S. C.* ſhall at any time during the ſaid term of ſeven years, be minded to break off and diſſolve the ſaid copartnerſhip, they ſhall either of them be at liberty ſo to do, on giving ſix months notice to the others of them, of ſuch her intention to diſſolve the ſame, and the party giving ſuch notice, paying the others of them 50l. out of her third part of the ſaid joint ſtock and produce thereof, as the ſame ſhall be appraiſed at.

Proviſo, that a copartner marrying ſhall quit the copartnerſhip within one year after, and pay to the others 50l.

PROVIDED ALWAYS, &c. (*that if one of the copartners marry, ſhe ſhall quit the copartnerſhip.*—See title PROVISO.) PROVIDED ALWAYS, and it is hereby declared and agreed by and between all the ſaid parties to theſe preſents, that if either of them the ſaid

E. C.

E. C. M. C. and *S. C.* shall marry within the term of seven years, that then the said party so marrying, shall quit the said trade and stock, and leave the same (being valued in such manner as herein before mentioned, in case of the death of either of the said parties) to the other of them, who shall pay for the said stock, and produce thereof, unto the party so marrying, what the same shall be valued at, within the space of one year after such marriage shall be had, by four equal quarterly payments; the party so marrying allowing to the other of them the sum of 50*l.* out of her third part of the said joint stock and produce thereof, as the same shall be appraised at, as if she had broke off the said copartnership in such manner as aforementioned. AND it is hereby agreed and declared by and between the said parties hereto, that if either of them the said *E. C. M. C.* or *S. C.* shall be minded to enlarge the time of this present copartnership beyond the said term of seven years, then such one of them shall give notice to the other of them, of such their intention, six months before the expiration of the said term of seven years, or in default thereof, this present copartnership shall cease and determine at the end of the said term of seven years. IN WITNESS,

What notice required on enlarging copartnership.

[No. 4.]

Agreement of Copartnership

Between two Brewers.

THIS indenture, &c. between *T. T.* of ——— of the one part, and *W. P.* of ——— of the other part, WITNESSETH, that the said *T. T.* and *W. P.* having had experience of each others fidelity and care, and in confidence thereof, for the future and the better in probability to augment their respective estates, have agreed upon a copartnership and joint trade; and therefore

Agreement to the copartnership.

Covenant for the same.

therefore each of them for himself respectively, and for his several and respective executors and administrators, doth covenant, promise and agree to and with the other of them, his executors and administrators, by these presents, that from and after the day of the date of these presents, they the said *T. T.* and *W. P.* shall and will be and continue copartners and joint traders in the art, trade, mistery and business of a brewer, at and in a messuage, &c. situate, &c. called, &c. now in the possession of the said *T. T.* and *W. P.* together with all, &c. thereunto appertaining, mentioned, or expressed in one or more book or books, inventory or inventories signed by both the said parties to their presents, and witnessed by the witnesses to these presents, on the day of the date hereof, for and during the time and term of —— years from the day of the date of these presents, fully to be completed and ended (if both the said parties to these presents shall so long live). And for the fair, equal, and better carrying on the said intended copartnership and joint trade in the said brewhouse, it is declared and agreed by these presents, by and between the said *T. T.* and *W. P.* that the said *T. T.* for his part and proportion, now hath in stock for the said trade in ready money, debts, goods, utensils, and implements fit for the said intended joint trade, to the full value of 1000*l.* and the said *W. P.* likewise for his part, &c. (as before) both which said sums together amount to the sum of 2000*l.* which is to remain as joint stock, and to be employed and used in and about the said trade of brewing, selling and uttering of ale and beer in the said brewhouse, for and during the said term of —— as aforesaid. And for the more orderly proceeding in, and carrying on the said intended trade and business, it is mutually covenanted, concluded, and agreed by and between the said parties to these presents, and each of them the said *T. T.* and *W. P.* doth for himself respectively, and for his several and respective executors and administrators, covenant, promise and grant

Where.

For what time.

Stock.

grant to and with the other of them, his executors and adminiſtrators, by theſe preſents, in manner and form following (to wit), that, &c. (to be true to each other). See p. ix. AND that each of them the ſaid *T. T.* and *W. P.* and their ſeveral executors and adminiſtrators ſhall have the full intereſt, right, title and property of, in and to one moiety, or half part of the ſaid joint ſtock of 2000*l.* and of and in one moiety or half part of all gains, profits and increaſe which ſhall ariſe, happen, accrue, or be made thereby; and alſo ſhall equally bear, pay and allow coſts, loſſes, &c. [See p. x. *mutatis mutandis*], other than ſuch as herein after are particularly expreſſed and agreed to the contrary. AND that the ſaid joint ſtock, and alſo all the buyings, ſellings, and dealings, gains, debts, and credits which ſhall grow, ariſe, happen, or be made of, or by reaſon or means of the ſaid copartnerſhip, or joint trade, credit, or dealing, or any thing incident or belonging thereto, ſhall from time to time, during all the term of this copartnerſhip, be truly entered and fairly written in ſome convenient and fitting book or books for that purpoſe, to be provided and kept at the houſe where the ſaid trade is to be carried on in ſuch manner as men of the like trade uſe or ought to do; which ſaid books the ſaid copartners and their reſpective executors and adminiſtrators ſhall freely, and at all times, as well after, as during the continuance of this copartnerſhip, have the right and peruſal, when and as often as it ſhall be deſired, and ſhall have liberty to tranſcribe, &c. [See p. xi.] AND that all bonds, bills, notes, ſpecialties, and ſecurities whatſoever, at any time made or taken for any matter or thing concerning their joint ſtock or trade, ſhall be made and taken in the names of both the ſaid copartners, and for their joint and equal uſe and benefit. AND that all notes and other ſecurities to be given to any perſon or perſons who ſhall intruſt the ſaid partners with goods or other things upon account of the ſaid trade, ſhall be made

Covenant to be true to each other.

Each of them to have a moiety of the ſtock and gains, and bear and pay his ſhare of loſſes and expences.

Books of accounts to be kept,

which the copartners may ſee and take copies of.

Bonds and notes to be taken in both their names.

The like of notes, &c. given.

made and given by and in the names of them both. AND ALSO that it shall and may be lawful to and for each of the said copartners weekly (to wit) on *Monday* in every week during the said copartnership, to have and take out of the said joint stock for their respective uses and occasions the sum of 20*s.* each. AND that neither of them the said copartners shall at any time, without the consent of the other of them release, &c. [See p. xii.] AND, &c. *neither to be bail, &c. without the other's consent. A general account to be stated once a year, entered in books and transcripts to be made, &c.* [See p. xii.]

Proviso that if one partner dies, no benefit shall be taken by the survivor.

PROVIDED ALWAYS, and it is expressly declared, conditioned and concluded by and between the said parties to these presents, and the true intent and meaning of the said parties hereunto and of these presents is, that if either of the said parties to these presents shall happen to depart this life before the said term of —— years intended for this copartnership shall in course of time run out and be expired, and before a final account and partition shall be made and passed between them, of all matters and things relating to their said joint trade and copartnership, yet nevertheless no benefit or advantage of survivorship shall accrue unto, or be had and taken by the other of them in any wise whatsoever, any law, usage or custom, or any thing herein contained to the contrary notwithstanding. AND IT IS ALSO PROVIDED, conditioned and agreed by and between the said parties to these presents, and each of them doth hereby for himself respectively, and for his several and respective executors and administrators, covenant, promise and grant, to and with the other of them, his executors and administrators, by these presents, that if the said *T. T.* shall happen to depart this life before the expiration of this copartnership, and *T. T.* jun. son of the said *T. T.* party to these presents, shall be minded and willing to enter into and become a partner with the said *W. P.* in this present copartnership, that he the said *W. P.* shall admit the said *T. T.* jun. into this copartnership, under the conditions, covenants

If one of the copartners in particular dies, and his son is willing to become a copartner, the other shall admit him;

venants and agreements herein before, and herein after mentioned and contained, touching the said copartnership; but if the said *T. T.* jun. shall decline or refuse to come into the said copartnership, then the surviving partner, his executors and administrators, shall and will truly pay, or cause to be paid unto the executors or administrators of the party so dying, the moiety or half part of the joint stock, and of all such produce, profit and increase as shall appear to be justly due and coming to such of the said partners so dying, at the time of the last yearly stating accounts, together with interest for the same, at the rate of 5 *l. per cent. per annum*, to be accounted from such said last yearly stating of accounts, it being the intent of the parties to these presents, that the party so dying shall not be entitled or liable to the profit or loss in trade from the time of the last stating of accounts to the time of their death, in manner as follows, (to wit) one moiety or half part thereof at the end of six months after the decease of such of the said copartners, and the other moiety or half part thereof at the end of 12 months next after such decease. AND that the surviving partner, his executor or administrator, shall have, take and enjoy to his and their own use and behoof, the other moiety or half part of the said joint stock, and of all such profit, produce or increase as shall appear to be justly due and coming to such surviving partner; and also of all goods, wares, debts, ready money, and things then within the said copartnership, without rendering an account thereof to the executor or administrator of the said deceased copartner. AND if any debt shall be owing by the said copartners in the said copartnership or joint trade, such surviving partner shall pay and satisfy the same within six months next after such decease, or so soon as such debts shall become due; and thereof, and therefrom, and of and from every part thereof, shall at all times thereafter save and keep harmless the heirs, executors and administrators of the said deceased partner, and for securing the several pay-

but if the son refuses, the deceased's moiety to be paid to his executors with interest;

and the surviving partner to have the other moiety.

Surviving partner to pay the debts owing by them,

and indemnify the executors, &c. from the same,

and give ſecurity to the executors, &c. of the deceaſed for their moiety.

ments herein before mentioned to the executors or adminiſtrator of ſuch partner ſo dying as aforeſaid, the ſaid ſurviving partner ſhall within 30 days next after ſuch deceaſe enter into and become bound in and by ſeveral bonds or obligations of uſual penalties to the executors or adminiſtrators of the deceaſed partner for the payment of the ſame accordingly; upon ſealing and executing of which ſaid bonds, and ſecuring the ſaid executors or adminiſtrators of the deceaſed partner of and from the joint ſtock, debts owing, and payable by the ſaid co-partners on their joint account at the time of their laſt ſettling accounts before ſuch death, the ſaid executors or adminiſtrators ſhall and will releaſe, aſſign and quit claim to the ſaid ſurviving partner, all their right, title, intereſt, claim and demand, of, in, and to the ſaid partible ſtock and eſtate, and all matters and things thereunto belonging. AND that upon the expiration of the ſaid term of —— hereupon agreed upon for the continuance of this co-partnerſhip, or within twenty days then next enſuing, a final account, partition and diviſion ſhall be made and paſſed by and between the ſaid co-partners, of, for, and concerning all ſuch goods, wares, ready money, debts, and other matters and things as ſhall be then due, owing, or belonging unto the ſaid joint ſtock and trade, or to the ſaid co-partners in reſpect thereof, or in any wiſe relating thereto, and alſo of and for all ſuch debts, dues and ſums of money as by reaſon of their joint trade ſhall be contracted, or be by them owing to any perſon or perſons, and likewiſe of and for all the gains and increaſe, damages and loſſes happening or accruing by, through, or in reſpect of the ſaid partible trade and co-partners, ſo that the true ſtate thereof may appear, and what and how much thereof ſhall then belong to each party, and then and thereupon, and after all debts and ſums of money owing on the account of, or by virtue of the ſaid co-partnerſhip ſhall be paid, each of them the ſaid *T. T.* and *W. P.*

Such executors, &c. to releaſe their right to the ſtock, &c.

Accounts to be paſſed within 20 days after co-partnerſhip ended.

W. P. and each of their executors and administrators shall have and take to his and their own proper use and benefit, one moiety or half part, (the whole into two equal parts to be divided) of all things then in stock between them. And as for the debts which shall then be due and owing on their joint account, they the said *T. T.* and *W. P.* shall, as equal as may be, divide and part the same into two several shares or lots, and the debts which by such lot shall fall out to either of the said copartners, his executors or administrators, together with the securities concerning the same, shall be assigned and set over to him or them by the other of the said copartners, his executors or administrators, and he or they shall be fully empowered to receive the same to his or their own use and benefit, without any let or hindrance, of or by the other of them, his executors or administrators, and that according to the true intent and meaning of these presents. And that neither of them the said *T. T.* and *W. P.* shall or will at any time or times during the said copartnership, exercise or carry on, either separately or in copartnership, with any other person or persons, the said mistery or trade of a brewer in any manner whatsoever. And lastly, it is mutually covenanted, concluded, and agreed, by and between the said parties to these presents, for themselves, their executors and administrators, that if any doubt, question, controversy or difference shall happen or arise between the said parties, concerning the said copartnership, the same shall be referred to two indifferent persons, being master brewers, to be nominated by the said copartners within 7 days next after such difference shall arise or happen, (each of the said copartners to chuse one) to be by them heard and determined, or else by an umpire to be nominated and appointed by the said two indifferent persons, in case they themselves cannot agree and settle the same, and that each of the said copartners, his respective executors and administrators, shall and will stand to,

Debts standing out to be divided and assigned.

That neither partner shall follow the said trade with any other person.

Differences to be left to arbitration.

abide, perform and keep ſuch order and determination therein, as the ſaid two indifferent perſons, or the ſaid umpire ſo to be choſen as aforeſaid, ſhall make and give between the ſaid referees, ſo as the ſame be rendered and given under the hands and ſeals of ſuch perſon or perſons, within twenty days next after ſuch difference ſhall be referred to them or him reſpectively. AND that neither of the ſaid parties to theſe preſents, his executors or adminiſtrators, ſhall commence or bring any action or ſuit, or ſeek any remedy whatſoever, either in law or equity to be relieved in the premiſes before ſuch difference ſhall be put to reference as aforeſaid, *(and a covenant, that either of the copartners may diſſolve the copartnerſhip on giving notice, and paying money; and covenant for performance of covenants.)* [See p. xiv.] IN WITNESS, &c.

When arbitration to be made.

No action to be brought before reference to arbitration.

[No. 5.]

Seed of Copartnerſhip

Between Brandy Merchants, where a Father advances Money to put his Son in Partnerſhip, and agrees to guarantee for him, he being a Minor. With many Special Covenants.

THIS indenture tripartite, made the —— day of —— in the —year of the reign of our Sovereign Lord George the Third, by the grace of God of *Great Britain*, *France* and *Ireland*, King, Defender of the Faith, &c. and in the year of our Lord —— between *A. B.* of —— ſtreet, *London*, brandy merchant, of the firſt part, *C. D.* of the ſame place, ſon of the ſaid *A. B.* of the ſecond part, and *E. F.* the younger of —— of the third part. WHEREAS the ſaid *A. B.* now and for many years paſt, hath alone followed and carried on his trade or buſineſs of a brandy merchant in the houſe wherein he now lives, ſituate in —— aforeſaid.

Parties.

Buſineſs of a brandy merchant.

aforeſaid. AND whereas the ſaid *A. B.* being deſirous of ſettling his ſaid ſon in the ſaid buſineſs, and to continue him therein, HATH propoſed to the ſaid *E. F.* that he and the ſaid *C. D.* ſhall be copartners in the ſaid trade and buſineſs of a brandy merchant, upon equal terms of profit and loſs, for ſuch time, and on ſuch terms and conditions as are herein after mentioned and agreed upon. AND the ſaid *A. B.* hath agreed to advance to or for his ſaid ſon, his ſhare of the capital ſtock herein after mentioned and agreed, to be employed therein during the ſaid copartnerſhip, ſubject to the conditions, and upon the ſecurities herein after mentioned and declared, and not otherwiſe. AND in regard the ſaid *C. D.* is not now of the age of 21 years, he being only of the age of —— years or thereabouts; he the ſaid *A. B.* hath alſo agreed to be guarantee for his ſaid ſon's faithful diſcharge and due performance of the ſeveral clauſes and agreements herein after mentioned and contained, which on his the ſaid *C. D.*'s part and behalf, are or ought to be performed, fulfilled and kept. NOW THIS INDENTURE WITNESSETH, that for the carrying the ſaid propoſal of the ſaid *A. B.* into execution, and in purſuance of the ſaid recited agreement on the part of the ſaid *A. B.* IT is hereby mutually covenanted and agreed, by and between the ſaid *A. B.* and *C. D.* and the ſaid *E. F.* AND the ſaid *A. B.* for himſelf, his heirs, executors and adminiſtrators, for and on the behalf of the ſaid ſon, the ſaid *C. D.* in reſpect of his not being of the age of 21 years as aforeſaid, doth ſeverally covenant, promiſe and agree to and with the ſaid *E. F.* his executors and adminiſtrators. AND the ſaid *E. F.* for himſelf, his heirs, excutors and adminiſtrators, doth covenant, promiſe and agree to and with the ſaid *A. B.* his executors and adminiſtrators, by theſe preſents, in manner following, (that is to ſay) that they the ſaid *C. D.* and *E. F.* ſhall and will become, continue, and be joint traders and copartners, in the trade and buſineſs of a brandy merchant, in the buying

Agreement for a partſhip.

Father to advance money for firſt partner,

and to guarantee for him, he being a minor.

Conſideration.

Mutual covenant

for a partnerſhip

for 6 years. and ſelling of brandy and rum, and other liquors, for and during the term of 6 years (if both of them the ſaid *C. D.* and *E. F.* ſhall ſo long live) to be computed, and to commence from the —— day of —— now next enſuing, in the ſhares and proportions, and ſubject to the clauſes, proviſoes and agreements herein after mentioned, (that is to ſay) one moiety or half part, the whole in two equal parts to be divided, of the ſaid joint ſtock and trade, and the profits and increaſe thereof, is and is hereby agreed and declared to be the ſhare and property of the ſaid *C. D.* ſubject nevertheleſs to ſuch payments and conditions as are herein after particularly mentioned and declared. AND the other moiety or half part of the ſaid joint ſtock and trade, and the profits and increaſe thereof, is and is hereby agreed and declared to be the ſhare and property of the ſaid *E. F.* and for the providing a ſufficient joint ſtock for the carrying on the ſaid joint trade, IT is hereby agreed and declared by and between all the ſaid parties to theſe preſents, that the ſum of 14,000*l.* ſhall be the capital joint ſtock for the carrying on the ſaid joint trade and copartnerſhip, (that is to ſay) 7000*l.* being one moiety thereof, is and is agreed to be brought in, and advanced and lent by the ſaid *A. B.* to and for his ſaid ſon, and the ſame is to be deemed as his the ſaid *C. D*'s. part and ſhare in the ſaid joint ſtock. BUT it is hereby agreed, that the ſaid *A. B.* ſhall be allowed intereſt for the ſame, during the continuance of this copartnerſhip, after the rate of 5*l. per cent. per annum*, and to be paid him out of his the ſaid *C. D*'s. ſhare of the profits, to ariſe and be made of the ſaid joint trade as hereafter is mentioned. AND further, that the ſaid ſhare of the ſaid *C. D.* in the ſaid joint ſtock, ſhall always be ſubject and liable to the repayment of the ſaid capital ſum of 7000*l.* ſo advanced and lent by the ſaid *A. B.* as aforeſaid. AND the ſaid *C. D.* ſhall have no power over the ſame, until the ſaid ſum and the intereſt thereof, ſhall be fully paid and ſatisfied without the conſent of the ſaid *A. B.* his executors or admi-

In moieties.

14000*l.* partnerſhip ſtock.

7000*l.* to be advanced by firſt partner's father,

for which to be allowed 5*l* per cent. intereſt.

adminiſtrators. AND the ſum of 7000*l.* being the remaining moiety, or half part of the ſaid joint ſtock, is and is agreed to be brought in and advanced by the ſaid *E. F.* as and for his part and ſhare of the ſaid joint ſtock. AND it is hereby further mutually covenanted, agreed and declared by and between the ſaid *C. D.* and *E. F.* and the ſaid *A. B.* for, and on the behalf of the ſaid *C. D.* his ſon, THAT the ſaid trade and copartnerſhip ſhall be carried on by the name, and under the firm of *C. D.* and *E. F.* and ſhall be ſo carried on and managed by them, in the houſe wherein the ſaid *A. B.* now lives, ſituate in —— ſtreet aforeſaid; and the vaults and warehouſes thereto belonging, and which they have taken of him, at the yearly rent of ——*l.* AND the ſaid *A. B.* doth by theſe preſents, agree and declare, that the ſaid joint trade ſhall not, during the continuance of this copartnerſhip, be charged with, or pay more for rent for the ſaid houſe, than ——*l.* a year, being the ſame rent which he the ſaid *A. B.* now pays for the ſame. AND it is alſo agreed, that the rent of the ſaid houſe, and all taxes and other rates, and the charges of houſekeeping, ſervants and journeymen's wages, and other charges, expences and all outgoings relating to the ſaid joint trade and copartnerſhip. AND all loſſes that ſhall, or may happen to the ſaid *C. D.* and *E. F.* for or by reaſon or means of the ſaid joint trade and dealing ſhall be borne, paid and ſuſtained by the ſaid joint ſtock, and the ſaid *C. D.* and *E. F.* in proportion to their reſpective ſhares therein; ſave and except that in caſe either of them, the ſaid *C. D.* and *E. F.* ſhall truſt, or give credit to any perſon or perſons, whom the other of them, or the ſaid *A. B.* ſhall diſlike, and ſhall before have forewarned the ſaid partners, or either of them not to truſt; that then and in ſuch caſe, the party ſo truſting, ſhall make good to the ſaid joint ſtock, the full value of the monies, good or effects which he ſhall ſo truſt, or give credit for, within 6 calendar months then next following. AND it is further agreed, that neither of them,

Partnerſhip firm.

Stock and trade to pay only 34*l.* per annum for rent of houſe, &c. and for carrying on buſineſs.

Charges of houſekeeping, &c. to be paid out of ſtock.

One partner not to give credit againſt the conſent of the other.

Neither to compound debts alone, or releaſe.

them, the ſaid *C. D.* and *E. F.* ſhall or will compound any debt or debts ſo to be due to the ſaid partnerſhip eſtate, without the conſent of the ſaid *A. B.* or releaſe or diſcharge any perſon or perſons from the debts owing by them, to the ſaid copartnerſhip, without receiving the full of ſuch debts; unleſs with the conſent and approbation of the other of them, the ſaid *C. D.* and *E. F.* and of the ſaid *A. B.* AND alſo, that neither of them, the ſaid *C. D.* and *E. F.* or the ſaid *A. B.* ſhall or will, during the continuance of this copartnerſhip, uſe or exerciſe the trade or buſineſs of a brandy merchant, or ſhall any ways deal in brandy or rum, or other liquors ſeparately, for his own proper account, or in partnerſhip, with or for the uſe or benefit of any other perſon or perſons, but only for the joint intereſt and advantage of both of them, the ſaid *C. D.* and *E. F.* in the proportions aforeſaid. AND further, that they the ſaid *C. D.* and *E. F.* ſhall, during the continuance of this copartnerſhip, employ their whole time in the buſineſs thereof, and in the management thereof; that it ſhall and may be lawful for the ſaid *A. B.* for the uſe of his ſaid ſon *C. D.* to take out of the caſh of the ſaid joint ſtock, the ſum of —— *l.* a month, monthly, and the ſaid *E. F.* the like ſum of —— *l.* a month, monthly, during the continuance of this copartnerſhip, towards their own private and particular expences; the ſame to be charged to their ſeveral accounts, and that neither of them, the ſaid *C. D.* or the ſaid *A. B.* for him, or the ſaid *E. F.* ſhall take out of the ſaid joint ſtock, or the caſh thereof, any other or further ſum or ſums of money, for his own ſeparate uſe, without the conſent of the ſaid *C. D.* and *E. F.* and the ſaid *A. B.* AND alſo, that neither of them, the ſaid *C. D.* and *E. F.* or the ſaid *A. B.* ſhall, during the continuance of this copartnerſhip, become bond, bail, or otherwiſe engaged with, or for any perſon or perſons whomſoever, for more than the amount of 100 *l.* in the whole, at any one time, or do or ſuffer to be done, any act, matter or thing by means, whereof

No ſeparate dealings.

Both partners to be diligent.

The firſt to go beyond ſea when requiſite at the partnerſhip expence.

Father of firſt partner to take 40*l.* per annum for his ſon's uſe, ſecond partner the like.

Neither to take money out of trade, or become bond ſecurity.

whereof the monies, goods, wares or effects of, or belonging to the ſaid joint ſtock, ſhall, or may be ſeized, attached or taken in execution, for the ſeparate debt of either of them, the ſaid *C. D.* and *E. F.* and the ſaid *A. B.* but that each of them, ſhall and will ſave harmleſs and keep indemnified the other of them, and the ſaid joint ſtock, and the profits thereof, from his own ſeparate debts, and from all loſſes and damages that may happen about the ſame. AND that neither of them the ſaid *C. D.* and *E. F.* ſhall take any apprentice or apprentices, or other covenant ſervant or ſervants, to be employed in the ſaid joint trade, without the conſent in writing of the other of them, and the ſaid *A. B.* firſt had and obtained for that purpoſe. AND in caſe they ſhall jointly agree, and ſhall, purſuant to ſuch joint agreement, take any apprentice or apprentices, or other covenant ſervant or ſervants; that then all monies, which ſhall be given with ſuch apprentice or apprentices, or other covenant ſervant or ſervants, ſhall be brought in, and added to the ſaid joint ſtock, for the mutual and equal benefit of both of them, the ſaid *C. D.* and *E. F.* AND that all charges and expences attending the keeping ſuch apprentices, or other covenant ſervants, ſhall be equally borne by both of them, the ſaid *C. D.* and *E. F.* AND it is hereby further agreed and declared, by and between all the ſaid parties to theſe preſents, that he the ſaid *A. B.* ſhall, during the continuance of this copartnerſhip be accommodated with a ſuitable lodging in the ſaid houſe where the ſaid joint trade is intended and agreed to be carried on as aforeſaid, for himſelf and a man ſervant, without paying or allowing any money, or other conſideration for the ſame; in conſideration that he has lately laid out a conſiderable ſum of money in repairing the ſame, and of his agreeing to permit them to carry on the ſaid joint trade therein, during the continuance of this copartnerſhip, at the ſame rent as he the ſaid *A. B.* now pays for the ſame. AND alſo, that if any or either of the ſaid parties ſhall bring in, and advance any

Or take apprentices, &c.

Money received with apprentices, &c. to be brought to joint account.

Charges of keeping apprentices, &c. to be joint.

Father of firſt partner to have a lodging in the houſe gratis for himſelf and man.

5l. per cent. to be allowed for extra money advanced.

any ſum or ſums of money, with the conſent of the other party, for the increaſe and better carrying on of the ſaid joint trade; that the ſame ſhall always be conſidered as a debt or debts due and owing from the ſaid copartnerſhip, and ſhall be repaid ſuch party ſo advancing the ſame with intereſt, after the rate of 5 *l.* for every 100 *l.* for a year, out of the ſaid joint ſtock, and the produce thereof, and before any diviſion ſhall be made thereof as before mentioned. AND it is hereby further agreed, that in caſe there ſhall, during the continuance of this copartnerſhip, be any occaſion for accepting or taking any bonds, mortgages or other ſecurities for the payment of any debt, or ſum of money to be due or owing to the ſaid copartnerſhip, the ſame ſhall be taken in the name of the ſaid *E. F.* alone. BUT is is hereby declared, that the ſame ſhall be in truſt for the ſaid copartners, and ſhall be entered into the partnerſhip books accordingly, as part of the ſaid joint ſtock. AND it is hereby agreed and declared, by and between the parties to theſe preſents, and the ſaid *A. B.* doth hereby for himſelf, his heirs, executors and adminiſtrators, covenant and agree to and with the ſaid *E. F.* his executors and adminiſtrators, that he the ſaid *A. B.* during the continuance of this copartnerſhip, ſhall and will act, and employ himſelf in and about the ſame, and do every thing according to the beſt of his ſkill and power, to promote the ſaid buſineſs, ſo to be carried on by virtue of theſe preſents, as ſhall be convenient to the ſaid *A. B.* AND for that purpoſe, that he the ſaid *A. B.* ſhall have recourſe to all books of account, letters and papers relating to the ſaid joint trade, and to inſpect, inſert therein, and take copies thereof, at his free will and pleaſure, and that he ſhall be conſulted by them the ſaid *C. D.* and *E. F.* touching, concerning or relating to the ſaid trade and buſineſs, in as full and ample manner, as if he was an actual partner therein with them. AND ſhall have liberty to draw upon the banker in the room of his ſaid ſon, for any ſum of money, that ſhall be

Securities to be taken in ſecond partner's name.

In truſt.

Covenant, that the father ſhould perſonally act,

and draw upon the banker for his ſon.

be neceſſary for carrying on the ſaid trade, and to do all other acts touching the ſaid trade and copartnerſhip, as if he was an actual partner therein as aforeſaid. AND ſhall have and receive for his attention and advice, in and about the ſaid buſineſs and partnerſhip's affairs out of his ſaid ſon's ſhare of the ſaid joint ſtock, and the profits thereof, the ſum of 100*l.* yearly. IT being the condition and meaning of the ſaid *A. B.*'s entering into the covenants and agreements herein contained; and of the ſaid *E. F.* entering into this copartnerſhip with the ſaid *C. D.* in manner herein mentioned. AND it is hereby further covenanted, agreed and declared, by and between the ſaid *C. D.* and *E. F.* and the ſaid *A. B.* for, and on the behalf of the ſaid *C. D.* his ſon, that they the ſaid *C. D.* and *E. F.* ſhall, at their joint and equal charge, provide from time to time, during the continuance of this copartnerſhip, proper books of account, and they or ſome perſon or perſons by their appointment, and with the conſent of the ſaid *A. B.* ſhall enter therein, juſt and true accounts of all their buyings, ſellings, receipts, payments and dealings concerning their ſaid joint trade, immediately after the ſame ſhall happen, and ſhall be juſt, honeſt and faithful to each other, in every reſpect concerning the ſaid copartnerſhip. AND that each of them the ſaid *C. D.* and *E. F.* and the ſaid *A. B.* his executors and adminiſtrators, for and on behalf of his ſaid ſon *C. D.* ſhall have free liberty of acceſs to the ſaid books, from time to time, and to inſpect, examine and copy the ſame, or any of the accounts or entries therein, to be contained or made at their own free will and pleaſure, during the continuance of this copartnerſhip, and for ſuch time afterwards, as ſhall be agreed on by the ſaid parties purſuant to theſe preſents. AND FURTHER, that they the ſaid *C. D.* and *E. F.* together with the ſaid *A. B.* ſhall and will at *Michaelmas* next, or within a fortnight afterwards, and from thenceforth twice in every year during the continuance of

And receive a yearly conſideration.

Books of account to be provided, &c.

Each to have acceſs to them.

Accounts when to be made up and how.

of this copartnerſhip, *viz.* on *Lady-day* and *Michaelmas-day*, or within one month after each ſuch time, join together and make up, ſtate and adjuſt, a true and fair account of adjuſtment and valuation, in writing, of all the monies, goods, wares, merchandize and effects belonging to the ſaid joint ſtock, and of the debts owing from or to them the ſaid *C. D.* and *E. F.* in reſpect to the ſaid joint trade, and all other their joint dealings and tranſactions, to the intent it may appear how much the net produce of the ſaid partnerſhip ſtock and eſtate, and how much the part of each of them the ſaid *C. D.* and *E. F.* may amount to, and what gains and profits ſhall have been made by the ſaid joint trade and copartnerſhip; and that upon the ſtating of every ſuch account, ſuch of the debts then due to the ſaid copartnerſhip as ſhall be eſteemed bad or dubious, ſhall be ſeparated from the others, and entered by themſelves, and ſhall be eſtimated and valued in ſuch account, and entered in the ſame accounts ſo to be ſtated at ſuch valuation; and when each of ſuch accounts ſhall be perfected, the ſame ſhall be tranſcribed in two books, and ſubſcribed by both of them the ſaid *C. D.* and *E. F.* and alſo by the ſaid *A. B.* (if living) for and on behalf of the ſaid *C. D.* his ſon; and that each of them the ſaid *C. D.* and *E. F.* or the ſaid *A. B.* for the ſaid *C. D.* ſhall have the keeping of one of the ſaid books: AND the ſaid accounts, ſo from time to time ſettled, ſhall not be opened or unravelled unleſs there ſhall be any error therein, ſuch error amounting to 20 *l.* and upwards, and then only for ſuch error, and ſo as the ſame be diſcovered in the life-time of both of them the ſaid *C. D.* and *E. F.* and not otherwiſe; and that upon every making up, ſtating and adjuſting ſuch half-yearly accounts, of and concerning ſuch joint trade and dealing as aforeſaid, all the clear gains, profits and produce of the ſaid joint ſtock, trade and copartnerſhip ſhall be parted, ſhared and divided by and between the ſaid *C. D.* and *E. F.* (that is to ſay) one moiety or half part, the whole in two equal parts

Each to have a copy, &c.

Accounts not afterwards to be opened unleſs, &c.

Profits to be divided.

parts to be divided of the ſaid gains, profits and produce, ſhall be paid and delivered to the ſaid *C. D.* his executors or adminiſtrators, in truſt for, and for the uſe of the ſaid *C. D.* and the other moiety or half part of the ſaid gains, profits and produce, ſhall be paid and delivered to the ſaid *E. F.* his executors or adminiſtrators. BUT it is hereby agreed and declared by the ſaid *C. D.* that at every ſuch diviſion of the net gains, profits and produce of the ſaid joint ſtock to the ſaid *A. B.* his executors and adminiſtrators ſhall and may, out of the ſaid *C. D.*'s ſhare of the ſaid net gains, profits and produce of the ſaid joint ſtock, retain and pay him and themſelves intereſt after the rate of 5 *l. per cent. per annum* for the ſaid 7000 *l.* ſo advanced and brought in by him the ſaid *A. B.* as and for his ſaid ſon's ſhare in the ſaid capital joint ſtock as aforeſaid, and all other ſum and ſums of money hereby agreed to be paid or allowed to the ſaid *A. B.* and which the ſaid *C. D.* ſhall be any ways indebted to the ſaid *A. B.* AND further, that at the expiration of this copartnerſhip, they the ſaid *C. D.* and *E. F.* ſhall join in account together, make up, ſtate, ſettle and adjuſt a true and fair account in writing of all monies, goods, wares, merchandize and effects belonging to the ſaid joint ſtock, and of all debts due and owing to and from the ſaid *C. D.* and *E. F.* in reſpect of their joint trade, and after payment of all ſums of money advanced and lent by any or either of the ſaid parties to the ſaid copartnerſhip, and with intereſt for the ſame as aforeſaid; and payment and ſatisfaction ſhall be made of all ſuch debts as ſhall be due from them in reſpect to the ſaid trade or good order taken for that purpoſe, all the monies, goods, wares, debts and effects then being part of or belonging to the ſaid joint ſtock and partnerſhip, ſhall be parted and divided into two equal parts or ſhares, one of which ſaid two parts ſhall be the property of the ſaid *C. D.* his executors or adminiſtrators, but ſubject to the payment of what ſhall be due to the ſaid *A. B.* as aforeſaid, and the other

Intereſt money to be paid thereout.

General ſettlement and diviſion at the end of the partnerſhip.

other of the ſaid two parts ſhall be the property of the ſaid *E. F.* his executors or adminiſtrators, and the ſame ſhall be divided by lots, in caſe of diſagreement between them. AND each of them the ſaid *C. D.* and *E. F.* his executors or adminiſtrators, ſhall not only aſſign and releaſe to the other of them the part or parts that ſhall belong or be allotted to him, but ſhall do all acts and things to aſſiſt and enable him to recover the ſame. AND it is further agreed, that if either of them the ſaid *C. D.* and *E. F.* ſhall die before the expiration of the ſaid term of ſix years, no benefit of ſurvivorſhip ſhall be had or taken thereby, other than as hereafter expreſſed. AND it is hereby further concluded, covenanted, agreed and declared by and between the ſaid *C. D.* and *E. F.* and the ſaid *A. B.* for and on the behalf of the ſaid *C. D.* his ſon, that in caſe the ſaid *C. D.* ſhall happen to die before the —— day of —— now next enſuing, and the ſaid *E. F.* ſhall him ſurvive, then and in ſuch caſe he the ſaid *E. F.* his executors or adminiſtrators, ſhall have, take and enjoy to their own uſe all the ready money, goods, wares, debts and other things then belonging, due or owing to the ſaid joint ſtock and eſtate, and the gain, profits and increaſe of the ſame, and in lieu and ſatisfaction of the ſaid *C. D.*'s ſhare and proportion therein, ſhall execute and deliver unto the ſaid *A. B.* his executors or adminiſtrators, within 30 days after the death of the ſaid *C. D.* a bond or obligation in a ſufficient penalty; and the ſaid *E. F.* alſo ſhall and will within 60 days next after the death of the ſaid *C. D.* procure one or more ſufficient able perſon or perſons, to be approved of by the ſaid *A. B.* his executors or adminiſtrators, as ſecurities for the ſaid *E. F.* and ſuch perſon or perſons ſo to be procured ſhall alſo execute and deliver unto the ſaid *A. B.* his executors or adminiſtrators, within the ſaid 60 days after the death of the ſaid *C. D.* the like bond or obligation in the ſame penalty, conditioned for the payment unto the ſaid *A. B.* his executors or adminiſtrators, of the ſum or value that ſhall have been

Each to aſſign, &c. with further aſſurance.

No benefit of ſurvivorſhip.

In caſe of the death of firſt partner before account time, ſecond partner to give bond with ſureties for payment of partnerſhip money, &c.

been brought into the ſaid joint ſtock by the ſaid *A. B.* for his ſaid ſon, and in diſcharge of all demands due to the ſaid *A. B.* on account of the ſaid partnerſhip (the ſums that ſhall have been taken out and received by the ſaid *A. B.* for the uſe of his ſaid ſon as aforeſaid, being thereout firſt deducted) at three equal payments, (that is to ſay) one third part thereof within four calendar months, one other third part thereof within eight calendar months, and the remaining third part thereof within twelve calendar months, to be computed reſpectively from the day of the death of the ſaid *C. D.* together with intereſt for the ſame, after the rate of 5 *l.* a-year for every 100 *l.* and ſo in proportion for any leſſer ſum, from the —— day of —— now next enſuing, being the time of the commencement of this co-partnerſhip. But if the ſaid *C. D.* ſhall happen to die after the making and finiſhing ſuch firſt half yearly account as aforeſaid, and before the expiration or other ſooner determination of this co-partnerſhip, and the ſaid *E. F.* ſhall him ſurvive, that then the ſaid *E. F.* his executors or adminiſtrators ſhall have, take, and enjoy to his and their own uſe all the ready money, goods, wares, debts and other things then belonging, due, or owing to the ſaid co-partnerſhip, ſtock and eſtate, and the gains, profits and increaſe of the ſame, and in lieu and ſatisfaction of and for the ſaid *C. D.*'s ſhare and proportion thereof the ſaid *E. F.* ſhall within thirty days from the death of the ſaid *C. D.* execute and deliver to the ſaid *A. B.* his executors or adminiſtrators a bond or obligation in a ſufficient penalty, and alſo ſhall and will within ſixty days next after the deceaſe of him the ſaid *C. D.* procure one or more ſufficient or able perſon or perſons as ſecurity for him the ſaid *E. F.* to be approved of by the ſaid *A. B.* his executors or adminiſtrators, and ſuch perſon or perſons ſo to be procured, ſhall alſo execute and deliver unto the ſaid *A. B.* his executors or adminiſtrators within the ſaid ſixty days next after the death of the ſaid *C. D.* the like bond or obligation in the ſame penalty conditioned

payable by inſtalments

with intereſt.

In caſe of death after ſecurity to be given for the amount of deceaſed's ſhare of property.

ditioned for the payment unto the ſaid *A. B.* his executors or adminiſtrators, ſuch ſum of money as the part, ſhare, and intereſt of the ſaid *C. D.* appeared to amount unto upon the foot of ſuch laſt ſtated account or eſtimate to ſecure to the ſaid *A. B.* his executors and adminiſtrators what ſhall be due and owing to him or them, for, or on account of the money ſo lent and advanced by him as aforeſaid, and all other monies due and owing to him by virtue of theſe preſents; and the reſidue thereof (if any) in truſt for the executors and adminiſtrators of the ſaid *C. D.* (the ſums which ſhall have been taken out or received by the ſaid *A. B.* for the uſe of the ſaid *C. D.* ſince the making up and ſtating ſuch laſt account, being firſt thereout deducted) at the times and in the proportions aforeſaid, together with intereſt for the ſame, at the rate aforeſaid, from the ſtating ſuch laſt account as aforeſaid; and in either of the ſaid caſes, upon the giving and executing ſuch ſeveral bonds by the ſaid *E. F.* and his ſecurities as aforeſaid, the executors or adminiſtrators of the ſaid *C. D.* ſhall execute and deliver to the ſaid *E. F.* a releaſe of his the ſaid *C. D.*'s ſhare and intereſt of and in the monies, goods, wares, debts and effects of the ſaid joint trade and ſtock. AND the ſaid *E. F.* ſhall execute and deliver to the executors or adminiſtrators of the ſaid *C. D.* a bond or obligation in a ſufficient penalty, with one or more ſufficient perſon or perſons as ſureties, conditioned for the paying and ſatisfying all ſuch debts as were due and owing by or from the ſaid copartners, in reſpect of the ſaid joint trade, at the death of the ſaid *C. D.* within 12 months next after the death of the ſaid *C. D.* and for indemnifying and ſaving harmleſs the executors or adminiſtrators of the ſaid *C. D.* from the ſame, and from all coſts, charges, damages and expences that may happen on account thereof. BUT if the ſaid *E. F.* ſhall be unable, or neglect to procure ſome ſufficient perſon or perſons to become bound with him in ſuch bonds as aforeſaid, then it ſhall and may be lawful to and for the ſaid *A. B.*

The repreſentatives of the firſt partner in ſuch caſe to releaſe.

2d partner to give ſecurity, &c. for payment of debts,

and to indemnify.

For want of ſureties, the father to poſſeſs himſelf of partnerſhip property, and ſell, &c.

A. B. his executors or adminiſtrators, for the uſe and benefit of himſelf, and the executors and adminiſtrators of the ſaid *C. D.* as herein before is mentioned, to take poſſeſſion of and receive all the monies, goods, wares, debts and effects of and belonging to the ſaid joint trade, ſtock and copartnerſhip, and to ſell and diſpoſe of the ſame, and by and out of the monies ariſing thereby, in the firſt place to pay and ſatisfy all the debts due and owing from the parties in copartnerſhip, and in the next place to ſatisfy himſelf or themſelves, the money for which ſuch bonds were to have been given as aforeſaid, returning the overplus to the ſaid *E. F.* his executors or adminiſtrators, and in ſuch caſe the ſaid *E. F.* ſhall aſſign unto the ſaid *A. B.* his executors or adminiſtrators in truſt and for the purpoſe aforeſaid, all the monies, goods, wares, debts and effects of the ſaid joint ſtock and trade, and ſhall not poſſeſs himſelf of or receive the ſame or any part thereof; but ſhall authorize and impower the ſaid *A. B.* his executors or adminiſtrators to receive and diſpoſe of the ſame for the purpoſes aforeſaid. AND it is hereby further covenanted, agreed and declared by and between the ſaid parties, and particularly the ſaid *A. B.* doth hereby for himſelf, his heirs, executors and adminiſtrators, covenant, promiſe and agree to and with the ſaid *E. F.* his executors and adminiſtrators, as followeth, (that is to ſay) That in caſe the ſaid *E. F.* ſhould happen to die before the —— day of —— now next enſuing, and the ſaid *C. D.* ſhall him ſurvive, then and in ſuch caſe he the ſaid *A. B.* his executors or adminiſtrators, ſhall have and take all the ready money, goods, wares, debts and other things then belonging, due or owing to the ſaid joint ſtock and eſtate, and the gains, profits and increaſe of the ſame, and in lieu and ſatisfaction of the ſaid *E. F.*'s ſhare and proportion therein, he the ſaid *A. B.* if he ſhall be then living; but if he ſhall be dead, then ſome one or more other ſufficient and able perſon or perſons as the ſaid *C. D.* ſhall procure, and ſuch as the executors

2d partner to aſſign, &c.

In caſe of death of 2d partner, the father of 1ſt to take the partnerſhip effects, and give ſecurity for payment of money, &c.

executors or adminiſtrators of the ſaid *E. F.* ſhall approve of, ſhall for and on the behalf of, and as ſecurity for the ſaid *C. D.* execute and deliver unto the executors or adminiſtrators of the ſaid *E. F.* within 30 days after his death, a bond or obligation in a ſufficient penalty, conditioned for the payment, unto the executors or adminiſtrators of the ſaid *E. F.* of the ſum or value that ſhall have been brought into the ſaid joint ſtock by the ſaid *E. F.* (the ſums that ſhall have been taken out or received by him for his own uſe being thereout firſt deducted) at three equal payments (that is to ſay) one third part thereof within four calendar months, and other third part thereof within eight calendar months, and the remaining third part thereof within 12 calendar months, to be computed reſpectively from the day of the death of the ſaid *E. F.* together with intereſt for the ſame after the rate of 5 *l.* a year for every 100 *l.* and ſo in proportion for any leſſer ſum, from the —— day of —— next, being the commencement of this copartnerſhip. But if the ſaid *E. F.* ſhall happen to die after the making and finiſhing ſuch firſt half yearly account as aforeſaid, and before the expiration or other ſooner determination of this co-partnerſhip, and the ſaid *C. D.* ſhall him ſurvive, that then the ſaid *A. B.* his executors or adminiſtrators ſhall have and take all the ready money, goods, wares, debts and other things then belonging, due or owing to the ſaid co-partnerſhip ſtock and eſtate, and the gains, profits and increaſe of the ſame to and for the uſe and benefit of the ſaid *C. D.* ſubject nevertheleſs to the demands of the ſaid *A. B.* as aforementioned, and in lieu and ſatisfaction of and for the ſaid *E. F.*'s ſhare and proportion thereof, the ſaid *A. B.* if he ſhall be then living, but if he ſhall be dead, then ſome one or more other ſufficient and able perſon or perſons as the ſaid *C. D.* ſhall procure, and ſuch as ſhall be approved of by the executors or adminiſtrators of the ſaid *E. F.* ſhall, for and on behalf of, and as ſecurity for the ſaid *C. D.* execute and deliver

by inſtallments,

with intereſt &c.

deliver unto the executors or adminiſtrators of the ſaid *E. F.* within ſixty days after his death, a bond or obligation in ſufficient penalty, conditioned for the payment to the executors or adminiſtrators of the ſaid *E. F.* ſuch ſum of money as the part, ſhare and intereſt of the ſaid *E. F.* appeared to amount to upon the foot of ſuch laſt ſtated account or eſtimate (the ſums which ſhall have been taken out or received by the ſaid *E. F.* for his own ſeparate uſe ſince the making up and ſtating ſuch laſt account being firſt thereout deducted) at the times, and in the proportions aforeſaid, together with intereſt for the ſame at the rate aforeſaid, from the ſtating ſuch laſt account as aforeſaid. And in either of the ſaid caſes laſt mentioned, upon the giving and executing ſuch bond by the ſaid *A. B.* or other ſecurities of the ſaid *C. D.* as laſt aforementioned, the executors or adminiſtrators of the ſaid *E. F.* ſhall execute and deliver to the ſaid *A. B.* his executors or adminiſtrators, in truſt for, and for the uſe of the ſaid *C. D.* his executors or adminiſtrators (but ſubject to ſuch demands of the ſaid *A. B.* as aforementioned) a releaſe of his the ſaid *E. F.*'s ſhare and intereſt of and in the monies, goods, wares, debts and effects of the ſaid joint trade and ſtock; and the ſaid *E. F.* if he ſhall be then living, but if he ſhall be dead, then ſome one or more other ſufficient and able perſon or perſons, as the ſaid *C. D.* ſhall procure, and ſuch as ſhall be approved of by the executors or adminiſtrators of the ſaid *E. F.* ſhall (for and on behalf of the ſaid *C. D.*) execute and deliver to the executors or adminiſtrators of the ſaid *E. F.* a bond or obligation in a ſufficient penalty, conditioned for the paying and ſatisfying all debts as were due and owing by and from the ſaid co-partners, in reſpect of the ſaid joint trade, at the death of the ſaid *E. F.* within twelve calendar months next after the death of the ſaid *E. F.* and for indemnifying and ſaving harmleſs the executors or adminiſtrators of the ſaid *E. F.* from the ſame, and from all coſts, charges, damages and expences that may happen on account thereof; but

to releaſe, &c.

and to indemnify.

If no ſureties, repreſentatives of ſecond to act.

but if neither the ſaid *A. B.* nor ſuch other perſon or perſons ſo to be procured by the ſaid *C. D.* as his ſecurities as aforeſaid, ſhall execute and deliver ſuch bond to the executors or adminiſtrators of the ſaid *E. F.* as aforeſaid, then it ſhall and may be lawful to and for the executors or adminiſtrators of the ſaid *E. F.* to take poſſeſſion of and receive all the monies, goods, wares, debts and effects of and belonging to the ſaid joint trade, ſtock and co-partnerſhip, and to ſell and diſpoſe of the ſame, and by and out of monies ariſing thereby, in the firſt place to pay and ſatisfy all the debts due and owing from the parties in co-partnerſhip, and in the next place to ſatisfy himſelf or themſelves the money for which ſuch laſt mentioned bonds were to have been given as aforeſaid, returning the overplus to the ſaid *A. B.* to and for the uſe and benefit of the ſaid *C. D.* his executors or adminiſtrators, ſubject to ſuch demands of the ſaid *A. B.* as aforementioned. AND in ſuch caſe the ſaid *A. B.* for and on behalf of the ſaid *C. D.* his ſon, doth hereby covenant and agree with the ſaid *E. F.* his executors and adminiſtrators, that all the money, goods, wares, debts and effects of the ſaid joint ſtock and trade ſhall be aſſigned or otherwiſe effectually veſted in the executors or adminiſtrators of the ſaid *E. F.* for the purpoſes aforeſaid, and that the ſaid *C. D.* ſhall not poſſeſs himſelf of, or receive the ſame or any part thereof, but ſhall and will permit and ſuffer, and (as far as in him lieth) fully authorize and impower the executors or adminiſtrators of the ſaid *E. F.* to receive and diſpoſe of the ſame for the purpoſes aforeſaid. AND the ſaid *A. B.* for himſelf, his heirs, executors and adminiſtrators, doth covenant, promiſe and agree, to and with the ſaid *E. F.* his executors, adminiſtrators and aſſigns, by theſe preſents, that in caſe the ſaid *C. D.* ſhall happen to die before the expiration of this co-partnerſhip, and the ſaid *E. F.* ſhall him ſurvive, and ſhall chuſe to continue the ſaid buſineſs of a brandy merchant in the ſaid houſe belonging

Effects to be aſſigned, &c.

Second partner to carry on the buſineſs ſolely on a certain event.

longing to the ſaid *A. B.* then, but not otherwiſe, he the ſaid *E. F.* ſhall have the ſole and entire benefit and advantage of carrying on the ſame therein, and that then and in ſuch caſe, and for that end and purpoſe he the ſaid *A. B.* his executors or adminiſtrators, ſhall and will, *within* one month next after the deceaſe of the ſaid *C. D.* aſſign and transfer unto him the ſaid *E. F.* the ſaid meſſuage or tenement and premiſes with the appurtenances, together with the indenture of leaſe thereof, and all his, the ſaid *A. B.*'s eſtate, right and intereſt therein; to hold the ſame unto the ſaid *E. F.* his executors, adminiſtrators and aſſigns from thenceforth, for and during all the reſt and reſidue of the term of years which the ſaid *A. B.* ſhall then have therein; but ſubject to the rent and covenants in the ſame leaſe, reſerved and contained on the ſaid leſſees part to be paid and performed; and upon condition that he the ſaid *E. F.* do and ſhall upon ſuch aſſignment being executed as aforeſaid, pay or cauſe to be paid unto him the ſaid *A. B.* his executors or adminiſtrators, in lawful money of *Great Britain*, what the ſaid meſſuages and premiſſes, ſhall by two indifferent perſons to be for that purpoſe nominated, one by the ſaid *A. B.* his executors or adminiſtrators, and the other by the ſaid *E. F.* be valued at, and do and ſhall pay the charges of drawing and ingroſſing the ſaid aſſignment. PROVIDED always, and it is hereby agreed and declared, by and between the ſaid parties to theſe preſents, that in caſe either of the ſaid *C. D.* and *E. F.* ſhall at the end or expiration of this copartnerſhip think fit to quit the ſaid trade, the other copartner ſhall chuſe to continue to carry on the ſame, and of which ſhall give notice in writing of ſuch his intention of quitting the ſaid trade and buſineſs, 6 months before the end of the ſaid copartnerſhip. THEN and in ſuch caſe the ſaid copartnerſhip ſtock, eſtate and effects ſhall be made up, applied and ſecured to the ſaid reſpective partners in the ſame manner, as is herein before declared, touching either of

House, &c. to be aſſigned to him.

Value to be aſcertained by arbitrators.

Proviſo, for notice to be given in caſe either ſhould not chooſe to continue after, &c.

the ſaid partners' death, after the ſtating of any ſuch half yearly accounts as aforeſaid; but it is hereby agreed and declared, to be the intention and meaning of the parties hereto, that at the end and expiration of this copartnerſhip, that he the ſaid *E. F.* ſhall continue with the ſaid *C. D.* in copartnerſhip, for the term of ſeven years, upon the terms herein expreſſed and declared, in caſe the ſaid *C. D.* ſhall be deſirous thereof, unleſs there ſhall be any reaſonable objection thereto, on the part of the ſaid *E. F.* AND it is hereby alſo convenant, agreed and declared by and between the ſaid *C. D.* and *E. F.* and the ſaid *A. B.* for and on behalf of the ſaid *C. D.* his ſon, that if any variance, ſtriſe, difference or controverſy ſhall at any time, during the continuance of this copartnerſhip, or at the end or other ſooner determination thereof, happen to grow, ariſe or be between all or any of the parties to theſe preſents, their, or any or either of their executors or adminiſtrators, upon, touching or concerning the ſaid joint trade or dealings, or any the buyings, ſellings, accounts, matters or things relating thereunto, or for, or touching any covenant, clauſe, matter or thing in theſe preſents contained; then, and ſo often as ſuch variance, ſtriſe, difference or controverſy ſhall happen, they the ſaid parties to theſe preſents, and each and every of their executors or adminiſtrators, ſhall upon reaſonable requeſt made by either or any of them, before any ſuit ſhall be commenced, for or touching the ſame, cauſe to be elected, named and choſen 3 indifferent perſons to hear and determine the ſaid difference and matters in difference, one of which arbitrators the ſaid —— *C. D.* and the ſaid *A. B.* their executors or adminiſtrators ſhall name and chuſe, and the ſaid *E. F.* his executors or adminiſtrators ſhall name and chuſe one other of the ſaid arbitrators, and the ſaid two arbitrators ſo to be nominated by them, the ſaid parties to theſe preſents, ſhall chuſe and name the third arbitrator, and that each of them the ſaid parties, and each and every of them, their

Differences to be ſettled by arbitration.

their and each and every of their executors or adminiſtrators ſhall reſpectively ſtand to, and perform and keep ſuch award, order, determination and judgment, which the ſaid three arbitrators, or any two of them ſhall make, and give in writing under their hands and ſeals unto the parties ſubject by theſe preſents thereunto, upon and touching the ſaid differences and matters in difference, ſo that the ſaid award be made and given as aforeſaid in writing, within forty days next after the choice or nomination of the ſaid arbitrators in that behalf. AND it is further agreed by and between the ſaid parties to theſe preſents, that ſuch ſubmiſſion and reference ſhall always be made a rule of his Majeſty's Court of Common Pleas at *Weſtminſter*. IN WITNESS, &c.

To be made a rule of court.

[No. 6.]

Agreement

Between Perſons to fit out a Ship to the *Eaſt-Indies*, and each to have an equal Share of the Profits at her Return.

WHEREAS *T. B.* commander of the good ſhip called the —— whereof *S. C.* of —— and *G. P.* are part-owners, is bound out in and with the ſaid ſhip in a voyage to *China*, and back again to the port of *London*: AND WHEREAS the ſaid *S. C.* *G. P.* and *T. B.* have agreed to make up together a ſtock of —— *l.* ſterling, to be laid out and inveſted in goods, wares and merchandizes, for the equal benefit of all the ſaid parties; for which purpoſe the ſaid *S. C.* and *G. B.* have each of them paid into the hands of the ſaid *T. B.* the ſum of —— *l.* the receipt whereof the ſaid *T. B.* doth hereby acknowledge. NOW THEREFORE IT IS AGREED between all the ſaid parties, and the ſaid *T. B.* doth hereby covenant, promiſe and

Recital of the ſhip being bound to, &c.

And of agreement to raiſe a ſtock to be laid out in goods.

Agreement of all the parties.

and agree to and with the ſaid *S. C.* and *G. P.* their executors, adminiſtrators and aſſigns, jointly and ſeverally, that he the ſaid *T. B.* ſhall and will add and make up —— *l.* of his own money, to the ſaid —— *l.* paid him by the ſaid *S. C.* and *G. P.* and that he the ſaid *T. B.* ſhall and will, upon the ſaid ſhip's arrival at *China*, or in her ſaid intended voyage, lay out and inveſt the ſame in goods, wares and merchandizes, to the moſt profit and advantage of all them the ſaid parties that he can, according to the beſt of his judgment, and with reſpect to the orders and directions of them the ſaid *S. C.* and *G. P.* in and touching the ſame; and ſhall and will bring home the effects and produce thereof in and with the ſaid ſhip, (the caſualties of the ſeas excepted) and upon the arrival at *London*, or any other port in *England*, or ſooner if opportunity ſhall ſerve, ſhall and will ſend the invoice of the produce of the ſaid —— *l.* to the ſaid *S. C.* and *G. P.* their executors or aſſigns, or ſome of them at *London*, and will alſo make a juſt and true account to them, or ſome of them, of all the produce of the ſaid —— *l.* AND IT IS AGREED between all the ſaid parties, that all the produce and effects of the ſaid —— ſhall be ſold and diſpoſed of at *London* with all convenient expedition after arrival thereof, for the equal advantage of all the ſaid parties, and that each of them ſhall have and receive one full third part of the net proceeds thereof. And, &c. [no benefit of ſurvivorſhip. See p. vii.] IN WITNESS, &c.

[No. 7.]

An Agreement to continue a Partnership.

ARTICLES, &c. between *M. B.* of the one part, and *H. P.* of the other part.

Whereas the said *M. B.* and *H. P.* have for several years last past been equally concerned together as partners or joint traders in the trade of ——, and in all profits and losses thereby. And whereas before sealing hereof, they have made up between them a full account and reckoning of and concerning the said trade, goods and debts belonging and owing to and by them on account thereof, containing all charges, profits and loss thereby, whereof each of them, hath to the date thereof, paid and received one equal moiety or half part, and upon making up the said account, there appears to be remaining in stock, at the sealing hereof, in goods and debts owing on account of the said trade, the sum or value of —— which belongs to them jointly, and wherein they are equally concerned; out of which said stock are due and payable on account of the said joint trade, several debts amounting to —— *l.* And whereas the said parties intend to continue the said trade of ——, in the dwelling house of the said *M. B.* in, &c. for —— years, with the said joint stock of, &c. and to be concerned therein equally as to profit and loss. Now these presents witness, that in consideration of the trust and confidence which the said parties have had and repose in each other, it is hereby declared, covenanted and agreed by and between the said parties for themselves, their executors, administrators and assigns, that the said parties are and will become and continue partners and joint traders in the trade of biscuit baking, and vending and selling of biscuits upon a joint and equal account between them, for profit and loss for the said time or term of —— years

Recital, that the parties have been several years copartners.

That accounts are settled.

And that they intend to continue their copartnership.

Agreement to continue.

Profit and loſs.

In conſideration of the rent, one of the partners to have a particular benefit.

Not to do any act to incumber.

years to commence from the date hereof, if both the ſaid parties ſhall ſo long live. AND IT IS AGREED, that all charges and loſſes, and all profits ariſing by and on account of the ſaid joint trade ſhall be equally paid, received and borne by and between the ſaid parties, and that the ſaid *M. B.* for and in conſideration of the rent of the ſhop and other conveniencies wherein the ſaid trade is driven, ſhall have and receive all benefit and advantage to be had and made by the bran ariſing by the flour or meal uſed in the ſaid joint trade as he hath hitherto received the ſame. AND it is further agreed, &c. (that the parties be true to each other), and have not, ſhall not, nor will do or ſuffer any act or thing whatſoever, whereby or by means whereof any goods, monies or things belonging to the ſaid joint trade ſhall or may be extended, ſeized or taken in execution, but that each of them ſhall and will defend the ſaid joint ſtock and trade from their own private and ſeparate debts, and all damages by reaſon thereof. AND THAT [*accounts to be ſettled at the end of the term*, See p. xxviii.]—*No ſurviverſhip* [See p. xviii.] IN WITNESS, &c.

[No. 8.]

Covenants

Indorſed on Articles of Copartnerſhip for continuing the ſame, with other Covenants.

THESE PEESENTS INDORSED WITNESS, That it is mutually declared and agreed between the within named *A.* and *B.* for themſelves, their executors and adminiſtrators reſpectively, that the partnerſhip and joint trade between them within mentioned, ſhall be continued between them for the term of —— years, from the expiration, (or you may begin thus): WE the within named *A.* and *B.* do by theſe preſent indorſed,

indorſed, declare and mutually covenant and agree unto and with each other, his and their executors and adminiſtrators to continue the ſaid joint trade and partnerſhip within mentioned for the further term of —— years, from the expiration, &c. of the —— years within mentioned, to be accounted, if both of them ſhall ſo long live, with the joint ſtock; and under, and ſubject to the ſeveral covenants and agreements as are within expreſſed and contained. AND WHEREAS ſince the ſealing and executing the within indenture of partnerſhip, the ſaid *A.* hath bought and purchaſed the leaſe and term of and in the ſaid meſſuages and premiſes within mentioned, which he then held at a rack rent. IT IS THEREFORE FURTHER DECLARED and agreed between the ſaid parties, that if the ſaid *A.* ſhall happen to die before the expiration of the ſaid term of —— years, and the ſaid *B.* ſhall him ſurvive, that then the executors and adminiſtrators of the ſaid *A.* are only to grant, and when the ſaid *B.* giving ſecurity for payment to the executors or adminiſtrators of the ſaid *A.* of ſo much money, as the ſaid *A.* his part and ſhare in the joint ſtock, and debts which ſhall then be owing on account of the ſaid joint trade ſhall amount unto for the ſum of —— *l.* to be allowed to the ſaid *A.* for his charges in repairs and other works about the ſaid houſe, as in the within indenture in that behalf is expreſſed, and according to the true meaning thereof, they the executors and adminiſtrators of the ſaid *A.* ſhall and will at the charge of the ſaid *B.* ſeal and execute to him a leaſe of the ſaid meſſuages or tenements for the term of —— years, to commence from the quarter day next after the deceaſe of the ſaid *A.* at the yearly rent of —— *l.* to be paid quarterly, and with ſuch covenants to be continued therein as are contained in the leaſe, whereby the ſaid *A.* holds the ſaid premiſes, which leaſe the ſaid *B.* agrees to accept, and at the ſame time to ſeal a counter-part thereof to the executors or adminiſtrators of the ſaid *A.* and that the ſaid executors or adminiſtrators are not to grant his leaſe

and

and term of years therein as within is mentioned, nor any further term therein, otherwiſe than as aforeſaid; the within written indenture, &c. IN WITNESS.

[No. 9.]

Form of a Charter-Party,

Generally uſed by Merchants.

N. B. This deed muſt be drawn upon a ſix ſhilling ſtamp.

THIS CHARTER PARTY of affreightment entered into this —— day of —— in the —— year of the reign of ——, and in the year of our Lord ——, between *A. B.* maſter of the good ſhip or veſſel called *the Royal Charlotte*, of the burthen of ſix hundred tons, or thereabouts, now lying in the port of *Liverpool*, of the one part, and *C.* and *D.* of *Liverpool*, in the county of *Lancaſter*, merchants, freighters of the ſaid ſhip, of the other part, WITNESSETH, that the ſaid *A. B.* hath this day letten the ſaid ſhip to freight from *Liverpool*, aforeſaid, to the port of *Drontheim*, and from thence to the port of *Newry* in *Ireland*, and the ſaid freighters have hired the ſame in manner and form following, (that is to ſay) that the ſaid ſhip now, and ſhall during the ſaid voyage, be at the expence of the ſaid *A. B.* or his aſſigns kept ſtaunch, tight and ſtrong, well manned, victualled, tackled, and provided in every reſpect fit for the merchants' ſervice, and particularly for performing ſuch a voyage, (the dangers and perils of the ſea, reſtraints of princes and rulers, fire and enemies, during the ſame always excepted). AND ALSO, that the ſaid *A. B.* or his aſſigns ſhall and will with all convenient diſpatch, proceed with the ſaid veſſel to the port of *Drontheim*, and there receive on board from the agents of the ſaid *C. D.* a full loading of deals over all; and being ſo loaden, the ſaid maſter with the ſhip and cargo ſhall with the firſt opportunity of wind and weather, proceed directly for *Newry* aforeſaid, and on her

her arrival there, deliver the ſame to the aſſigns of the ſaid *C.* and *D.* at ſuch convenient place or places, where the ſaid ſhip and cargo may ſafely come. AND alſo that the ſaid ſhip ſhall for her loading at the port of *Drontheim* ſtay twenty running days, and for diſcharging at *Newry* fifteen running days, that is to ſay, thirty-five running days in the whole, if required, and ſo end the ſaid intended voyage, IN conſideration of which, the ſaid freighters or their aſſigns, agree not only to load and put on board the ſaid ſhip, the ſaid cargo at the port of *Drontheim* as aforeſaid, and to receive or cauſe the ſame to be received from on board her at *Newry* aforeſaid, and that within the days and time limited for her loading and diſcharging as aforeſaid, but alſo ſhall and will pay, or cauſe to be paid unto the ſaid *A. B.* or his aſſigns in full for the freight and hire of the ſaid ſhip, for the ſaid voyage, at and after the rate of *thirty-five ſhillings and ſixpence (Iriſh ſterling)* per ſtandard hundred for the deals which ſhall be loaden on board of the ſaid veſſel at *Drontheim*, and delivered at *Newry*, with two-thirds of all pilotage and port charges during the voyage, the freight to be paid as follows, that is to ſay, the ſaid maſter to be ſupplied with what caſh he may want for the ſhip's neceſſary diſburſements at *Drontheim* and *Newry*, the remainder by good bills on *London*, at three months date, together with the ſum of *four guineas* per day, to be paid by the day, as the ſame ſhall grow due, for every day of the ſaid ſhip's detention, over and above the days and time limitted for her loading and diſcharging as aforeſaid. AND alſo the ſhip to be at no expence for lighterage or riſk attending the cargo after it is put over board. AND for the true performance hereof, each of the ſaid parties bindeth himſelf, his executors, adminiſtrators and aſſigns reciprocally unto the other, eſpecially the ſaid *A. B.* bindeth his ſaid ſhip, her freight and appurtenances; and the ſaid freighters, their goods to be loaden on board her, each to other, in the penal ſum of ſeven hundred

hundred pounds ſterling, firmly by theſe preſents. IN WITNESS whereof, each of the ſaid parties hath hereunto ſet his hand and ſeal the day and year firſt within written.

Sealed and declared, being firſt duly ſtamped, in the preſence of } *A. B.* *L. S.* } *C.* and *D.* *L. S.*

E. F. witneſs to the ſignature of *C.* and *D.*
G. H. witneſs to the ſignature of *A. B.*

[No. 10.]

A Copartnerſhip

Between two Perſons, whereby no preſent Stock is depoſited, but each Party is to advance Money monthly.

THIS Indenture, *&c.* BETWEEN *T. N. &c.* and *J. D. &c.* WHEREAS *(recital as to leaſe of premiſſes)*. AND WHEREAS *(recital as to their agreeing to become partners)*. NOW THIS INDENTURE WITNESSETH *(on uſual conſideration become partners)*. AND to the end, intent and purpoſe the better to enable them the ſaid parties to carry on ſuch trade or buſineſs and workmanſhip as aforeſaid, it is hereby further covenanted and agreed between the ſaid parties hereto, that each of them the ſaid parties ſhall, immediately after the execution hereof, and afterwards every week, or month, or otherwiſe, equally advance ſuch ſums of money from time to time in every year during this copartnerſhip, and as the ſaid copartners ſhall mutually agree, as ſhall be neceſſary and ſufficient for, and as a ſtock as well for the buying of all ſuch —— to be by them ſold, bartered or vended as aforeſaid; as alſo for the buying of all ſuch tools, inſtruments, oil, &c. and all other neceſſary materials whatſoever, to be uſed for the working and other things

Each party to advance money weekly or otherwiſe.

For buying goods and materials, and paying all incident charges.

things for ſale or otherwiſe; as likewiſe for the paying and defraying of all other neceſſary and incident charges and expences whatſoever relating to the buying, bartering, ſelling and vending of ſuch ——— and other things, or otherwiſe touching or concerning the ſaid joint trade or buſineſs. AND FURTHER, that all ſuch monies or ſtocks ſo to be advanced as aforeſaid, and all gains, increaſe, profit, produce and proceeds thereof ſhall be uſed and employed by and between the ſaid parties to theſe preſents, to and for their joint uſes and upon their joint account both of profit and loſs, according to their reſpective ſhares therein, and the covenants and agreements herein after mentioned and expreſſed touching the ſame, (that is to ſay) that they the ſaid parties, and their reſpective executors and adminiſtrators, ſhall at all times during the continuance of this copartnerſhip, and at the determination of the ſame, have a ſeveral and particular right. [Share of the profits, ſee p. ix.] AND that neither [no benefit of ſurvivorſhip, ſee p. vii.] AND that all ſuch money and ſtock ſo to be advanced and made as aforeſaid, ſhall be by them the ſaid partners uſed, diſpoſed and employed in the ſaid joint trade or buſineſs, in manner as aforeſaid, for the utmoſt profit and advantage of them the ſaid parties in ſuch moieties as aforeſaid, and not otherwiſe. AND [to be true to each other, ſee p. ix.] AND that neither of the parties to uſe any *other* trade without conſent, ſee p. ii. AND [not to become bail, ſee p. xii.] AND that if at any time during this copartnerſhip the ſaid *T. N.* ſhall procure, permit or ſuffer any judgment to be recovered or maintained againſt him for any ſum or ſums of money whatſoever (not due upon account of the ſaid joint trade); and in caſe any execution ſhall be thereon proſecuted or ſued forth againſt his perſon, or his part or ſhare in the ſaid then joint ſtock and trade, that then and in ſuch caſe he the ſaid *T. N.* without his immediate making ſatisfaction for the ſame out of his own proper monies, ſhall therefore forfeit and

As to each party's ſhare.

No benefit of ſurvivorſhip.

Monies to be uſed in this trade only.

To be true to each other.

Not to become bail.

As to *T. N.* confeſſing a judgment.

and loſe all his part or ſhare of and in the ſaid ſtock and trade unto the ſaid *T. D.* and alſo from thenceforth ſhall loſe all his then future benefit and produce to ariſe, or be had or made thereby, any thing herein contained to the contrary thereof notwithſtanding. AND, &c. [the ſame as to *J. D.*] AND, &c. [not to lend money, ſee p. vii.] AND, &c. [all charges, &c. to be paid by partners, ſee p. vi.] AND WHEREAS the ſaid meſſuage or tenement being let to both the ſaid parties, and he the ſaid *T. N.* not now dwelling in any part thereof, and he the ſaid *J. D.* now holding the old building quite upright, together with the waſh-houſe thereunto adjoining, being part of the ſame, and there being another part thereof which is new-built, &c. NOW it is hereby further agreed and covenanted by and between the ſaid parties hereunto, that until ſuch new building ſhall be let, or his the ſaid *T. N.*'s reſidence or dwelling therein, that he the ſaid *J. D.* ſhall yearly, during the ſaid copartnerſhip, allow and pay quarterly unto the ſaid *T. N.* the ſum of —— for the ſaid old building and waſh-houſe now enjoyed by him as aforeſaid. AND that from and after ſuch new building ſhall be let to any perſon or perſons during this copartnerſhip, that the rent thereof ſhall go and be equally divided between them the ſaid parties during the time of ſuch letting thereof. AND it is hereby mutually covenanted, agreed and declared by and between the ſaid parties hereto, that no apprentice, during the term, ſhall be taken by either of them the ſaid copartners into the ſaid joint trade or buſineſs, without the mutual conſent of each other: and in caſe any ſuch apprentice or apprentices during the ſaid copartnerſhip ſhall be by them ſo taken, that then and in ſuch caſe all and every ſum and ſums of money to be had and received with every ſuch apprentice ſhall be equally divided between them the ſaid parties, ſhare and ſhare alike; and alſo that each of them the ſaid parties ſhall have liberty and authority during this copartnerſhip to command and employ each other's apprentices

The ſame as to *J. D.* Not to lend money. All charges to be paid by partners.

As to the new and old buildings of the meſſuage.

As to apprentices.

prentices in and about the buſineſs relating to the ſaid joint trade. AND, &c. [books of account to be kept, ſee p. x. and xvii.] AND FURTHER ALSO, [to account once a year, ſee p. xvi.] AND FURTHER ALSO in caſe either of the ſaid parties hereunto ſhall happen to die before the end of this preſent copartnerſhip, or before or after any ſuch general account ſo made up, and ſtated and ſubſcribed between them in manner as aforeſaid; and that there ſhall be any debts due from or to the ſaid parties hereto, on account of the ſaid joint trade, that then and in that caſe all ſuch debts as ſhall be then due from the ſaid parties on account of ſuch their joint trade ſhall be by them forthwith equally paid by the ſurviving partner, and the executors or adminiſtrators of the partner ſo dying; and that then and in ſuch caſe, all and every the debts as ſhall be then due to the ſaid copartners on account of their ſaid joint trade, ſhall be likewiſe equally ſhared and divided between the ſaid ſurviving partner, and the executors and adminiſtrators of the party ſo dying, and in caſe they cannot agree touching the diviſion thereof, then the ſame ſhall be done by caſting of lots as in ſuch caſe uſually accuſtomed, and that then and in ſuch caſe, alſo the ſurviving partner within ten days next after the deceaſe of his partner, do, ſhall and will (if ſo required) at the requeſt and charge of the executors or adminiſtrators of the party ſo dying, and at his her or their expence, either aſſign or pay, or ſecure to be paid to the ſaid executors or adminiſtrators, all ſuch deceaſed partner's ſhare of and in all and every the debts ſo due to the ſaid joint trade as aforeſaid, within twenty days then next following. AND FURTHER ALSO, that from and after ſuch end or other determination of this preſent copartnerſhip, all ſuch debts as ſhall be then due to the ſaid joint trade, and ſo to be divided in manner as aforeſaid, ſhall go, belong and appertain to the parties as follows, viz. THE debts ſo ſhared, divided or allotted to the executors or adminiſtrators of the party dying, ſhall go and be to his, her or their uſe

Books of account.

To account once a year.

If either of the parties ſhall happen to die,

all debts to be equally paid,

and all debts due to be equally divided.

Surviving partner to aſſign the ſhare, &c. to the executors or adminiſtrators.

Of the diviſion of debts, &c.

of

or benefit, and the debts ſo divided, ſhared or allotted to the ſurviving party, ſhall go and be to and for the uſe and benefit of him, his executors and adminiſtrators, and that all ſuch debts ſo reſpectively ſhared, divided or allotted in manner as aforeſaid, ſhall and may be ſo received, had, taken and enjoyed accordingly; and that as well the ſurviving partner, his executors and adminiſtrators, as alſo the executors and adminiſtrators of the party dying, ſhall not without the conſent in writing of each other, releaſe, diſcharge, compound or acknowledge ſatisfaction for any ſuch debt or debts, but ſhall by all lawful ways and means whatſoever, as ſhall be requeſted by each other, and at the charge of ſuch perſon ſo requeſting, do all reaſonable acts and things, either by letter of attorney or otherwiſe, for the better enabling each other, the executors or adminiſtrators of each other, to ſue for, recover, receive and diſcharge all and every ſuch debts as ſhall be ſo divided or allotted to each other in manner as aforeſaid. AND it is hereby further mutually covenanted and agreed, by and between the ſaid parties, that in caſe either of the ſaid parties ſhall happen to die, before the end of this copartnerſhip, and in ſuch caſe, if the widow of ſuch party dying, ſhall be minded to come in and carry on the ſaid joint trade, with the ſurviving partner, during the then reſidue of the ſaid term, and ſhall give 20 days notice thereof to ſuch ſurviving partner, that then and in ſuch caſe the widow of ſuch party ſo dying, at the end of 20 days notice thereof to the ſurviving partner, ſhall be admitted and continue, and be as a copartner with ſuch ſurviving partner in the ſaid joint trade, during the then reſidue of the ſaid term, in as full, ample and beneficial manner as her then late huſband was, to all intents and purpoſes whatſoever. PROVIDED, and ſo as ſuch widow during ſuch copartnerſhip, ſhall find and pay a journeyman's wages, to do the working part in the ſaid joint-trade; and ſo as ſhe, the executors and adminiſtrators, be ſubject and liable to all and every the

The widow of either party dying, to be admitted a partner upon her giving 20 days notice.

To find a journeyman in the place of her huſband,

and to be ſubject to covenants.

the covenants, clauſes and agreements herein contained, *mutatis mutandis*, which on the part of her ſaid huſband are hereby covenanted to be paid, done and performed, or as near thereto as ſhe can or may do. PROVIDED NEVERTHELESS, that in caſe ſuch widow at any time after ſuch admittance into the ſaid copartnerſhip, ſhall be minded to relinquiſh and quit the ſame, that then and in ſuch caſe, on her giving three months notice thereof to the ſurviving partner, it ſhall and may be lawful for ſuch widow, at the end of ſuch three months notice thereof, to be at liberty to leave and quit her ſaid copartnerſhip in the ſaid trade. IN WITNESS, &c.

Such widow to be at liberty to quit the copartnerſhip upon giving 3 months notice.

[No. II.]

Deed of Diſſolution.

THIS Indenture made the —— day of —— in the —— year of the reign of our ſovereign lord *George* the Third, &c. and in the year of our Lord —— between *A. B.* of —— haberdaſher of hats, of the one part, and *C. D.* of —— aforeſaid, haberdaſher of hats, of the other part.

Parties.

WHEREAS by indenture of co-partnerſhip or covenants bearing date the —— day of —— and made or mentioned to be made between the ſaid *C. D.* of the one part, and the ſaid *A. B.* by the name and deſcription of *A. B.* of the borough of *Southwark* in the county of *Surry*, haberdaſher of hats, of the other part, they the ſaid *C. D.* and *A. B.* did mutually covenant and agree (under and ſubject to the proviſoes, conditions and agrements therein contained) to become, continue, and be co-partners and joint traders togethers in the trade and buſineſs of a haberdaſher of hats, and in buying and ſelling of wool, tea, and ſuch other commodities, goods, wares and merchandizes as they the ſaid partners ſhould mutually think fit and agree to trade or deal in, for and

Recital of a deed of copartnerſhip.

during the full time and term of —— years, to be accompted from the —— day of —— next enſuing the date thereof, if both the ſaid parties ſhould ſo long live, determinable nevertheleſs as thereafter mentioned; for the managing and carrying on of which ſaid joint trade and undertaking, they the ſaid parties agreed to bring in and make up in ready money or goods fit for the purpoſe, approved of and reaſonably valued and appraiſed by and between themſelves, or (in caſe of any difference between them) by ſuch other indifferent and proper perſons, appraiſers, as they ſhould mutually elect and agree upon for that purpoſe, a capital joint ſtock amounting to the ſum or value of 6000*l.* whereof the ſaid *C. D.* did thereby agree within one year after the commencement of the ſaid co-partnerſhip to bring in and advance in ready money or goods as aforeſaid the full ſum or value of 4500*l.* being 3-4th parts or ſhares thereof; and the ſaid *A. B.* did alſo thereby agree within the ſame time of one year to bring in and advance in ready money or goods as aforeſaid the full ſum or value of 1500*l.* being the remaining fourth part of the ſaid capital or joint ſtock: of and in which ſaid joint ſtock, and of the gains, profit and increaſe to be made thereof, it was thereby declared and agreed, that the ſaid *C. D.* his executors and adminiſtrators, ſhould have and be intitled to three full fourth parts, the whole into four equal parts to be divided, as and for his ſhare, intereſt and proportion thereof, and that the ſaid *A. B.* his executors and adminiſtrators ſhould have and be intitled to the remaining fourth part as and for his ſhare, intereſt and proportion thereof. AND WHEREAS by an indenture bearing date the —— day of —— and made or mentioned to be made between the ſaid *A. B.* of the one part, and the ſaid *C. D.* of the other part, after reciting to the effect before recited; and alſo reciting that the ſaid *C. D.* had advanced and paid into the ſaid joint trade the ſaid ſum of 4500*l.* as and for his part and ſhare therein: but the ſaid *A. B.*

A. B. not being able then to advance and pay his ſaid fourth part or ſhare, or any part thereof, had requeſted the ſaid *C. D.* to lend the ſame upon his bond and the ſecurity next therein after mentioned, which he the ſaid *C. D.* had agreed to. AND alſo reciting that the ſaid *A. B.* by one bond or obligation under his hand and ſeal bearing even date therewith, became bound to the ſaid *C. D.* in the penal ſum of 3000*l.* with condition thereunder written for making the ſame void if he the ſaid *A. B.* his executors or adminiſtrators ſhould pay or cauſe to be paid to the ſaid *C. D.* his executors, adminiſtrators or aſſigns, the full ſum of 1500*l.* with intereſt for the ſame at the rate of 5*l.* *per cent. per annum* on the —— day of —— then next enſuing the date thereof, and as a further ſecurity for the re-payment of the ſaid 1500*l.* and intereſt, he the ſaid *A. B.* had agreed to releaſe and aſſign his fourth part, ſhare and intereſt, of and in the ſaid capital joint ſtock, and of the gains, profits and increaſe thereof to the ſaid *C. D.* in manner thereinafter mentioned. IT IS by the ſaid indenture now reciting witneſſed, that for the conſideration therein mentioned, the ſaid *A. B.* did aſſign and ſet over, remiſe, releaſe and quit-claim unto the ſaid *C. D.* all that the ſaid fourth part, ſhare and intereſt of him the ſaid *A. B.* of, in, and to the ſaid capital joint ſtock and of all monies, goods, wares, merchandiſes, debts and effects thereto belonging, and which, during the ſaid co-partnerſhip ſhould or might belong thereto, and of the gains, profits and increaſe thereof, and all the eſtate, right, title, intereſt, property, profit, benefit, advantage, claim and demand of him the ſaid *A. B.* of, in and to the ſame or any part thereof, to hold unto the ſaid *C. D.* his executors, adminiſtrators and aſſigns, as his and their own proper monies, goods, wares, merchandiſes, chattels, debts, effects and eſtates, from thenceforth freely for evermore, ſubject to a proviſo therein contained, for making void the ſame on payment of the ſaid princi-

pal sum of 1500*l.* and interest, as therein particularly mentioned, as in, and by the said recited indentures, relation being thereunto respectively had, may more fully and at large appear. AND WHEREAS the said *C. D.* and *A. B.* have ever since the said ____ day of ____ been and continued copartners and joint-traders, in the said trade or business of a haberdasher of hats, and in buying and selling of wool, tea, and such other commodities, goods, wares and merchandizes, as the said parties have thought fit to deal in, to the ____ day of ____ last past. AND WHEREAS the said *C. D.* and *A. B.* having drawn out an account of all their said partnership stock, debts and effects, and of their receipts and payments touching their said joint-trade and dealing, to the said ____ day of ____ last past, do find that the said trade hath not answered the end which was intended by the said copartnership, and that it is the interest of both the said parties to end and determine the same, whereupon it is agreed by and between the said *C. D.* and *A. B.* that the said copartnership trade and joint dealing shall accordingly end and determine as from the said ____ day of ____ last past; and that the whole partnership stock and debts shall vest in, and remain the property of the said *C. D.* and that he the said *C. D.* shall release unto the said *A. B.* all demands whatsoever, either on account of the said copartnership, or otherwise howsoever, save and except the sum of ____ lent by the said *C. D.* to the said *A. B.* and for payment of which the said *A. B.* has this day executed a bond to the said *C. D.* in the penalty of ____ *l.* and in regard the said trade has been carried on from the said ____ day of ____ last past, in the joint names of the said *C. D.* and *A. B.* the said *C. D.* in lieu of the profits which may have been made by the said joint stock from that time to the day of the date hereof (¼th of which, if the copartnership had continued, would belong to the said *A. B.* after a deduction of the interest due to the said *C. D.* on the above mentioned security) hath agreed to allow from the said ____ day

Partnership established.

Business haberdasher of hats, &c.

Agreement for dissolution.

—— day of —— last past to the day of the date hereof to the said *A. B.* wages for his trouble and time after the rate of 100*l.* a-year. AND forasmuch as the said *A. B.* hath, during all that time boarded the servants as in time of partnership according to the said in part recited articles, it is agreed, that the said *A. B.* shall be repaid the same, and an account has been this day settled by the said *C. D.* and *A. B.* of what is due to the said *A. B.* for the said board and wages, and also of what the said *A. B.* hath received from the said partnership stock since the said —— day of —— last, and there remains due to the said *A. B.* on the balance of the said account the sum of ——

Ad partner to continue in the service of the other.

AND WHEREAS the said *A. B.* hath agreed with the said *C. D.* to continue in the service of the said *C. D.* from henceforth to the said —— day of —— next, and from that time for another year at the option of the said *C. D.* to as he do signify the same in writing to the said *A. B.* two months at least before the expiration of the said term. AND the said *A. B.* hath agreed, that during the time that he shall be in the service of the said *C. D.* he the said *A. B.* shall faithfully serve the said *C. D.* in the capacity of a shopman, and behave himself in every respect as a shopman ought to do. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for divers good causes and considerations, them the said *C. D.* and *A. B.* thereunto respectively moving, IT is hereby mutually covenanted, declared and agreed by the said parties to these presents, and the said *C. D.* and *A. B.* do severally and respectively for themselves, and for their several and respective heirs, executors and administrators, covenant, promise and agree to and with the other of them, his heirs, executors and administrators, that the said copartnership or joint trade and every part and branch thereof; and also the said recited indenture of the —— day of ——, and every covenant, article, clause, proviso and agreement therein contained, shall from the —— day of

Consideration.

Dissolution.

of —— laſt be void and abſolutely ended, determined, diſcontinued and diſſolved, any thing in the ſaid recited indenture of copartnerſhip contained, to the contrary in any wiſe notwithſtanding. AND the ſaid *A. B.* in

Settlement.

purſuance of the ſaid agreement, and for and in conſideration of the ſaid ſum of —— *l.* of lawful money of *Great Britain*, being the balance of the ſaid account, due to the ſaid *A. B.* for the board and wages as aforeſaid, to him the ſaid *A. B.* in hand paid by the ſaid *C. D.* at and before the enſealing and delivery of theſe preſents, the receipt whereof is hereby acknowledged, and alſo for and in conſideration of the covenants, releaſes and agreements herein contained on the part and behalf of the ſaid *C. D.* his executors and adminiſtrators, and for divers other good cauſes and conſiderations, him thereunto moving, hath bargained,

Aſſignment of effects to one partner.

ſold, aſſigned and releaſed. AND by theſe preſents, doth bargain, ſell, aſſign and releaſe unto the ſaid *C. D.* his executors, adminiſtrators and aſſigns, all that the ſaid fourth part, ſhare and intereſt of him the ſaid *A. B.* of and to the ſaid capital joint trade, and of all goods, wares, merchandizes, monies, debts and effects thereto belonging, in any manner of way whatſoever, or in or to which the ſaid ſaid *A. B.* has any right, title or intereſt jointly with the ſaid *C. D.* by virtue of the ſaid copartnerſhip. AND all the eſtate, right, title, intereſt, property, profit, benefit, advantage, claim and demand whatſoever, of him the ſaid *A. B.* of in and to the ſaid capital joint ſtock, effects, money and debts, and every or any part thereof; and all the profits, produce, gains, proceeds and advantages which have been or ſhall be hereafter made by the ſaid partnerſhip in any manner of ways whatſoever, ſo as the ſaid *A. B.* his executors or adminiſtrators ſhall, or may have no claim or demand on the ſaid *C. D.* his executors or adminiſtrators, on account of the ſame. To

Habendum.

have, hold, receive and enjoy the ſaid fourth part, ſhare and intereſt, and all other the ſhare and intereſt of him the ſaid *A. B.* of, in, and to the ſaid capital joint ſtock,

ſtock, and of all goods, wares, merchandizes, debts, monies, profits and effects thereto belonging, and all and ſingular other the premiſes hereby aſſigned and releaſed, or mentioned or intended ſo to be, and every part and parcel thereof, with their and every of their appurtenances unto the ſaid *C. D.* his executors, adminiſtrators and aſſigns, to and for his and their own proper uſe, benefit and behoof, and as his and their own proper goods and chattels for ever. AND the ſaid *A. B.* for himſelf, his executors and adminiſtrators, in further purſuance of the ſaid agreement, and to enable the ſaid *C. D.* his executors and adminiſtrators to receive all the ſaid partnerſhip debts and effects, to and for his and their own uſe and benefit, hath made, ordained, authoriſed, conſtituted and appointed, AND by theſe preſents, DOTH make, ordain, authoriſe, conſtitute and appoint the ſaid *C. D.* his executors and adminiſtrators to aſk, demand, ſue for, recover and receive of and from all and every perſon and perſons whatſoever, all and every the debts, ſum and ſums of money, goods, chattels and effects whatſoever and howſoever, now due and owing or belonging to the ſaid copartnerſhip in any manner of ways whatſoever, and upon receipt of the ſame, or any and every of them, or any and every part and parcel of them, and every of them to give, ſign and execute proper and ſufficient releaſes, acquittances and diſcharges for the ſame; and for that purpoſe, he the ſaid *A. B.* doth hereby give and grant unto his ſaid attorney and attornies, full power and authority to ſtate and ſettle all accounts and differences, any ways relating to the ſaid copartnerſhip joint trade, with all and every perſon and perſons whatſoever, and to compound and releaſe all and every, or any part of the ſaid debts and demands, as he and they ſhall think fit and neceſſary. AND to do all and every other act, matter and thing whatſoever, in and about the premiſſes, as fully and effectually to all intents and purpoſes as he the ſaid *A. B.* could or might do if perſonally preſent. AND the ſaid *A. B.* doth hereby for himſelf,

Power of Attorney

to receive debts, &c

Confirmation of acts.

himself, his executors and administrators ratify and confirm all and whatever the said *C. D.* his executors or administrators shall or may lawfully do or cause to be done in and about the premisses, by virtue of these presents. Covenant. AND the said *A. B.* doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *C. D.* his executors, administrators and assigns, that he the said *A. B.* his executors, administrators or assigns, shall not, nor will at any time or times hereafter receive, release, acquit or discharge any of the debts or demands, due to the said copartnership, or any actions or suits that shall be brought, sued or commenced for, or on account of the same, without the consent of the said *C. D.* for that purpose in writing, first had and obtained. Not to release debts, &c. Nor shall, nor will do or suffer, or cause to be done, any act, matter or thing whatsoever, whereby the said *C. D.* his executors, administrators, or assigns shall, or may be hindered or obstructed in the recovering and receiving of the said debts, goods, chattels and effects, due, owing and belonging to the said copartnership, or any part thereof; but shall and will from time to time, and at all times hereafter, at the cost and charge of the said *C. D.* do, perform and execute all and every further and other lawful matters and things for the better enabling him the said *C. D.* his executors, administrators or assigns, to get in and receive the same, to and for his and their own use and benefit as aforesaid. For further assurance. AND the said *A. B.* for the considerations assigned, HATH remised, released and forever quit-claimed. Release from assignor to assignee. AND by these presents, DOTH for himself, his executors and administrators, remise, release, and for ever quit-claim unto the said *C. D.* his executors and administrators, all and all manner of action and actions, cause and causes of actions, suits, differences, controversies, quarrels, bonds, covenants, notes, bills, damages, estate, right, title, claims and demands whatsoever, both in law and equity, which he the said *A. B.* now hath, or which he his executors, administrators

executors or assigns can or may at any time or times hereafter have, claim, challenge or demand against the said *C. D.* his heirs, executors or administrators for or by reason or means of the said copartnership, or any other matter, cause or thing whatsoever, from the beginning of the world to the day of the date hereof, save and except the covenants, clauses and agreements herein after contained on the part and behalf of the said *C. D.* his executors and administrators, to be paid, done or performed. AND the said *C. D.* in pursuance of the said agreement, and in consideration of the above mentioned assignment and release, doth hereby accept of the said joint stock, debts and effects, in full of all demands, which he or his executors or administrators have or can, or may have on the said *A. B.* his executors or administrators, for or by reason or means of the said copartnership or joint dealing, or on any other account whatsoever, except as herein before and after is excepted. AND the said *C. D.* HATH remised, released, and for ever quit claimed, AND by these presents, DOTH for himself, his heirs, executors, and administrators, remise, release, and for ever quit-claim unto the said *A. B.* his executors and administrators, all, and all manner of action and actions, cause and causes of actions, suits, differences, controversies, quarrels, bonds, covenants, notes, bills, damages, claims and demands whatsoever and howsoever, both at law and in equity, which he the said *C. D.* now hath, or which he his executors, administrators or assigns can or may at any time or times hereafter, have, claim, challenge or demand of or against the said *A. B.* his heirs, executors or administrators, for or by reason or means of the said copartnership, or any other matter, or thing relating thereto, or any other matter, cause or thing whatsoever, from the beginning of the world, to the day of the date hereof, save and except the covenants and agreements herein contained, on the part and behalf of the said *A. B.* his executors and administrators, to be done and performed.

Acceptation.

Release from assignee to assignor.

AND

AND alſo, ſave and except the ſaid ſum of —— ſo as aforeſaid, due from him the ſaid *A. B.* to the ſaid *C. D.* by virtue of the ſaid above mentioned bond, bearing even date herewith as aforeſaid. AND the ſaid *C. D.* doth hereby for himſelf, his heirs, executors and adminiſtrators, covenant, promiſe and agree to and with the ſaid *A. B.* his executors and adminiſtrators, in manner following, (that is to ſay), That he the ſaid *C. D.* his executors and adminiſtrators ſhall and will, as ſoon as conveniently may be, pay and diſcharge all debts and demands whatſoever, due and owing from the ſaid *C. D.* and *A. B.* on account of the ſaid copartnerſhip, or which he the ſaid *A. B.* his executors or adminiſtrators ſhall or may be liable to pay, ſatisfy or make good jointly with the ſaid *C. D.* for or by reaſon or means of the ſaid copartnerſhip. AND alſo, ſhall and will from time to time, and at all times hereafter, well and ſufficiently ſave, defend, keep harmleſs and indemnified the ſaid *A. B.* his heirs, executors and adminiſtrators, and his and their, and every of their eſtate, goods, chattels and effects of, from and againſt all coſts, payments, charges, demands and expences whatſoever and howſoever, which he the ſaid *A. B.* his heirs, executors or adminiſtrators, or his or their eſtate, goods, chattels or effects ſhall or may ſuffer, ſuſtain or be put unto, for or by reaſon or means of the ſaid copartnerſhip, joint trade or dealing, or for or by reaſon or means of the ſaid *C. D.* his executors or adminiſtrators, making uſe of the name of the ſaid *A. B.* in any ſuit or action for the recovery of the ſaid copartnerſhip's debts and effects, or by reaſon or means of his being made defendant in any ſuits, or any other matter or thing whatſoever, relating to the ſaid copartnerſhip. AND it is hereby mutually agreed by and between the ſaid parties to theſe preſents, that the ſaid *A. B.* ſhall continue and be a ſervant as a ſhopman to the ſaid *C. D.* in the ſaid buſineſs, from this time to the —— day of —— now next, at the wages and after the rate of 100 *l.* year, which the ſaid *C. D.* hereby

Covenant to pay debts.

Indemnify, &c.

Covenant for ſecond partner to be the ſhopman to the other,

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If one of two partners become bankrupt, the ſolvent partner may, if for a valuable conſideration and without fraud, diſpoſe of the partnerſhip effects; and if he afterwards fail, the aſſignees under a joint commiſſion againſt

gainſt both, cannot maintain trover againſt the *bonâ fide* vendee of ſuch partnerſhip effects *Page* 193

After a diſſolution of partnerſhip by agreement, by an execution, or by a bankruptcy, the partner out of poſſeſſion of the partnerſhip effects, has the ſame lien on any new goods bought in, which he had upon the old 201

One of three partners in a ſhip and cargo, the out-fit of which was 4,658 *l.* pays only 410 *l.* in part of his third ſhare, and gives his notes for the remainder; but before they become due, is a bankrupt; the other partners cannot, by voluntarily diſcharging the notes, ſtand in his place for the ſhare of the profits; but the aſſignees are entitled to a *full third*, both of the profits and of the value of the ſhip 155

Where a perſon relies on the faith of ſeveral partners, though one only is concerned, all ſhall be charged 66

If a bill is drawn by two, payable to "*us, or our order*," and ſubſcribed by both, tho' not in partnerſhip, they make themſelves partners by the form of the bill, to the effect of making an indorſement by one of them valid *Page* 366

If two are partners, as *attornies* and *conveyancers*, and *one* receive money to be laid out on mortgage, the *other* is anſwerable for the amount, though his partner gave only his own *ſeparate receipt* for it 9

The being a partner, or not, is a matter of fact which he who is a partner cannot but know 34

Partners are joint tenants in the ſtock and effects, and they continue ſo throughout 2

Partners in merchandizing with, or otherwiſe concerned in run goods, the Crown may come againſt any one for the penalty 259

Proof need only be that the goods came into his power, or into his agent's cuſtody *ibid.*

If a partner is a creditor upon the partnerſhip fund, he can have no ſatisfaction but out of the ſurplus, which ſhall remain after the joint creditors are paid 210, 211

Partnerſhip.

Partnerſhip is a voluntary contract, between two or more perſons, for joining together their

their money, goods, or labor, upon an agreement that the gain or loss shall be divided proportionably *Page* 1
From what time a partnership shall be said to commence 8, 34
What share in a partnership a person shall be said to have 36
What is necessary to constitute a partnership 38
To constitute a partnership there should be a concern in the sale, as well as purchase of things bought together 49
When money is advanced to a trader, the true criterion is to consider whether the profit or premium is certain and defined, or casual, indefinite and depending on the accidents of trade. In the former case it is a *loan*, in the latter a *partnership* 23
In a general partnership to carry on trade, the sale by one partner is the sale by all, and therefore though one sells the goods, or merchandizeth with them, yet action must be brought in all their names 71

Part-owners.

Part-owners are tenants in common of a ship 91
If one of several part-owners of a ship objects to a voyage the others propose making, he may by process out of the admiralty arrest the ship, and compel the other part-owners to give security for her safe return *Page* 94
By the common law, as applied to part-owners, each of them is possessed *per my et per tout* 96
An action on the case for negligence of the master lies against the part-owners of a ship, as well as against the master; but all the part-owners ought to be joined 341
The master of a ship is not to be considered as a partner 99
The law considers a master upon all occasions, to be an officer, who must render and give an account of the whole charge, when once committed to his care and custody 100
A master of a ship may bring trespass as a bailiff of goods may 101
If a master of a ship buys provisions for the ship, and has money from the owners to pay for them, but fails without paying the money, the owners are liable in proportion to their respective shares 112

Pleading.

If one partner only brings an action where the contract was joint, the defendant may take advantage of it at the trial, and nonsuit the plaintiff; but in the case of a *tort*, this must be pleaded in abatement *Page* 336

In *torts*, all the trespassers need not be made parties; but in actions upon contract, every partner must be made a defendant 343

The sale by one partner is the sale by all, and therefore though one sells the goods, or merchandizeth with them, yet action must be brought in all their names; and in such case the defendant shall not be received to wage his law, that the other partner did not sell the goods to him, as is supposed in the declaration 71

Where an action is brought against two joint debtors, and one only appears, the creditor may have judgment for his whole debt against the person appearing, and by default against the person who does not appear 346

If *A.* pleads a partnership between himself and *B.* and after issue joined, a partnership is proved between *A.* *B.* and *C.* this would be conclusive against the defendant *Page* 355

If an action is brought against one partner only, no advantage can be taken of the omission, but by plea in abatement 347

In a joint demand where one of the creditors will not join in the action, he is summoned and severed, and the other has judgment *quod sequatur solum* 357

Privilege.

No copartner in any trade or undertaking is entitled to the privilege of Parliament 221

Rent.

If in articles of partnership it is stipulated, that the rent of the premises shall be paid out of the *private cash* of one of the parties; these words only mean, that the rent shall not be paid out of the partnership 331

Rights.

Respecting the rights of partners 201

Nothing can be considered as the exclusive right, or actual

al ſhare of one partner, but his proportion of the reſidue, upon a balance being ſtruck, of the accounts between them *Page* 155
Where one partner takes out more money from the partnerſhip ſtock than his ſhare amounted to, the other has a right to come upon the ſeparate eſtate *pro tanto* 205
If one partner has taken out more than his ſhare of the partnerſhip property, joint eſtate cannot prove againſt the ſeparate before the ſeparate creditors are ſatisfied 209
Unleſs the partner took out money with a view to defraud the joint eſtate *ibid.*
Where a partner brings an action in his own right for money received after the death of the other partner, the defendant may ſet off whatever was due to him from the plaintiff 213
Nothing is to be conſidered the excluſive right of one partner, but his proportion of the reſidue upon balance of the partnerſhip accounts 155

Smuggling.

Smuggling is a trading within the bankrupt laws 276
An action cannot be maintained by ſeveral partners for goods ſold by one of them living in *Guernſey*, and packed by him in a particular manner for the purpoſe of ſmuggling, though the other partners who reſided in *England* knew nothing of the ſale; for it is a contract by ſubjects of this country, made in contravention of the laws: and ſuch a caſe muſt be conſidered in the ſame light as if all the partners reſided in *England* *Page* 224
If one of two partners advance money in a ſmuggling tranſaction, he cannot recover his proportion of it againſt his partner, becauſe the tranſaction is prohibited 241
If partners are concerned in ſmuggling, though not all together when the act is done, yet each may indivividually be proſecuted for the penalty; though at the ſame time the King can have but one ſatisfaction 256

Statute of Limitations.

An acknowledgment by one partner, is ſufficient to take a caſe out of the Statute of Limita-

Limitations as againſt the others *Page* 372

Though the Statute of Limitations has been always conſtrued to except accounts open between merchant and merchant, yet that is to be underſtood with this diſtinction, that if open accounts be by ſubſequent acts continued, they are not to be barred by the intervention of ſuch length of time from the original tranſaction 304

The Statute of Limitations pleaded by one partner to a bill brought by another for the balance of an account, and allowed 304

Statutes.

5 *Eliz. c.* 4. 74
1 *Jac.* 1. *c.* 15. 417
21 *Jac.* 1. *c.* 19. 173
5 *W.* & *M. c.* 20. 53
3 & 4 *Annæ c.* 9. *ibid.*
4 & 5 *Ann. c.* 17. 359
8 *Ann. c.* 7. 258
9 *Ann. c.* 14. 228
10 *Ann. c.* 15. 359
2 *Geo.* 2. *c.* 22. 316
5 *Geo.* 2. *c.* 30. 315
7 *Geo.* 2. *c.* 8. 248
7 *Geo.* 2. *c.* 15. 102
7 *Geo.* 2. *c.* 28. 233
8 *Geo.* 2. *c.* 18. 271
8 *Geo.* 2. *c.* 24. 316

Stock-jobbing.

If two perſons jointly engage in a ſtock jobbing tranſaction, and incur loſſes, and employ a broker to pay the differences, and one of them repay the broker, *with the privity and conſent of the other*, the whole ſum, he may recover a moiety from that other in an action for money paid to his uſe, notwithſtanding the 7 *Geo.* 2. *c.* 8. which avoids and declares illegal all ſtock-jobbing tranſactions *Page* 233

Survivorſhip.

Where money is owing to two partners, and, after the death of one, it is paid to a third perſon, the ſurviving partner may maintain an action for money had and received in his own right, and not as *ſurvivor* 213

The ſame of money received after the teſtator's death, for which his executor may maintain *aſſumpſit* in his own right 213

The ſurvivor and the executor cannot join in an action 51

There ſhall be no benefit of ſurvivorſhip in copartnerſhip dealings 438

Though

Though there is no benefit by ſurvivorſhip amongſt merchants, yet if two joint-merchants contract with a bailiff, the contract is entire and joint, and by the death of one ſurvives to the other *Page* 73

If one partner dies, though the debts and effects ſurvive, yet the ſurvivor is conſidered in equity barely as a truſtee for the repreſentatives of the deceaſed 168

If there be two partners in trade, and one of them buy goods for them both, and the other dieth, the ſurvivor may be charged by *indebitatus aſſumpſit* generally, without taking notice of the partnerſhip, or that the other is dead, and he ſurvived 220

In articles of copartnerſhip it is not neceſſary to provide againſt ſurvivorſhip 443

Title.

The title of partners is undivided, whether each individual partner contributes exactly in the ſame proportion or not 1

Tort.

If one partner only brings an action where the contract was joint, the defendant may take advantage of it at the trial, and nonſuit the plaintiff: but in the caſe of a tort, this muſt be pleaded in abatement *Page* 336

In torts, all the treſpaſſers need not be made parties; but in actions upon contract, every partner muſt be made a defendant 343

Trover.

One partner cannot bring trover againſt another 205

Uſury.

If *A.* upon a loan of money, ſtipulate to take half the profits upon a re-ſale of goods to be purchaſed by the borrower, which profits exceed 5 *l. per cent.* and *A.*'s principal is not riſked, *quære*, if ſuch contract be not *uſurious* 278

In all partnerſhip contracts where money is furniſhed by one ſide only, if the caſualty goes to the intereſt of ſuch money only, and not to the principal, it is uſury 295

A bond in the penalty of 200 *l.* conditioned for the performance of articles of partnerſhip, is not an uſurious contract 298

Diſtinction

Diſtinction to be taken between an uſurious contract within the ſtatute, and an unconſcionable bargain *Page* 282

If the borrower of money give a bond for the principal and intereſt at 5 *l. per cent.* and covenant at the ſame time alſo to pay to the lender a certain portion of profits of trade, this is an uſurious contract, and the obligee cannot recover on the bond *Page* 287

If intereſt and principal be ſecured, and it be at the will of the party who is to pay it, it is no uſury 297

MVSEVM BRITAN NICVM

FINIS.